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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ENERGY TRANSPORTATION SYSTEMS INC.,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals improperly substituted its own view for that of the Secretary of the Interior concerning the appropriate construction of the Flood Control Act of 1944.

2. Whether the Secretary of the Interior is authorized under the Flood Control Act of 1944 to contract for the beneficial use of irrigation water stored in the main stem reservoirs of the Missouri River Basin.

LIST OF PARTIES

The following parties were plaintiffs in the District Court and appellees in the Eighth Circuit on the issue of the Secretary of the Interior's authority under the Flood Control Act of 1944: the States of Missouri, Iowa and Nebraska, Kansas City Southern Railway Company, The Sierra Club and the Nebraska, Iowa and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America.

The following parties were defendants in the District Court and appellants in the Eighth Circuit* on the issue of the Secretary of the Interior's authority under the Flood Control Act of 1944: Energy Transportation Systems Inc.; Colonel William R. Andrews, Jr. [Steven G. West], District Engineer, Omaha District, United States Army Corps of Engineers; Brigadier General Mark J. Sisinyak [Charles E. Dominy], Division Engineer, Missouri River Division, United States Army Corps of Engineers, Omaha, Nebraska; Lieutenant General J. K. Bratton [E. R. Hieberg, III], Chief of Engineers, United States Army Corps of Engineers; John O. Marsh, Jr., Secretary of the Army; Joseph B. Marcotte, Jr., Regional Director, Upper Missouri Region, Bureau of Reclamation; Robert N. Broadbent [C. Dale Duvall], Commissioner, Bureau of Reclamation; Maxwell T. L. Lieurance, Wyoming State Director, Bureau of Land Management; Robert F. Burford, Director, Bureau of Land Management; Garrey E. Caruthers [Wayne N. Marchant], Assistant Secretary of the Department of the Interior for Land and Water Resources [Assistant Secretary of the Department of the Interior for Water and Science]; James G. Watt [Donald P. Hodel], Secretary of the United States Department of the Interior; Craig W.

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*Where the named parties have changed, the new names are included in brackets. Similarly, where the title of a position has changed, the new title is in brackets.

Rupp, Regional Forester, Region II, (Rocky Mountain Region), United States Forest Service; R. Max Peterson, Chief, United States Forest Service; John R. Block [Richard E. Lyng], Secretary of the United States Department of Agriculture; Anne M. Gorsuch [Lee M. Thomas], Administrator, Environmental Protection Agency.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Energy Transportation Systems Inc. ("ETSI") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (Pet. App. 1a) are reported at 787 F.2d 270. The opinion of the District Court (Pet. App. 45a) is reported at 586 F. Supp. 1268.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 73a) was entered on March 13, 1986. The petition for rehear-

ing and suggestion of rehearing *en banc* were denied by order dated July 10, 1986 (Pet. App. 74a). On September 30, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including December 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Flood Control Act of 1944, 33 U.S.C. § 701-1 (1982), provides in part:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers . . . .
>
> In conformity with this policy:
>
> * * * *
>
> (b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partially west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

Section 9 of the Flood Control Act of 1944,[1] Pub. L. No. 78-534, ch. 665, 58 Stat. 887, provides in part:

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[1] All pertinent provisions of the Flood Control Act of 1944 are reprinted in the Appendix to this petition (Pet. App. 76a).

(a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

* * * *

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388 [43 U.S.C. §§ 372 *et seq.*] and Acts amendatory thereof or supplementary thereto) . . . .

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c) (1982), provides in part:

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That . . . [n]o contract relating to municipal water supply or miscellaneous purposes . . . shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

Section 212 of the Reclamation Reform Act of 1982, 43 U.S.C. § 390*ll* (1982), provides:

(a) Applicability of Federal reclamation laws

Notwithstanding any other provision of law, neither the ownership or pricing limitation provisions nor the other provisions of Federal reclamation law, including this subchapter, shall be applicable to lands receiving benefits from Federal water resources projects constructed by the United States Army Corps of Engineers, unless—

(1) the project has, by Federal statute, explicitly been designated, made a part of, or integrated with a Federal reclamation project; or

(2) the Secretary, pursuant to his authority under Federal reclamation law, has provided project works for the control or conveyance of an agricultural water supply for the lands involved.

(b) Payment of construction, operation, maintenance and administrative costs allocated to conservation or irrigation storage

Notwithstanding any other provisions of this section to the contrary, obligations that require water users, pursuant to contracts with the Secretary, to repay the share of construction costs and to pay the share of the operation and maintenance and contract administrative costs of a Corps of Engineers project which are allocated to conservation storage or irrigation storage shall remain in effect.

STATEMENT OF THE CASE

A. Introduction.

Petitioner ETSI received a permit from the State of South Dakota and, thereafter, a contract from the Secretary of the Interior, authorizing ETSI to use for industrial purposes irrigation water stored in Lake Oahe, a main stem reservoir of the Missouri River. Narrowly stated, this litigation concerns the statutory authority of the Secretary to enter such a contract for the use of water stored in a reservoir operated by the United States Army Corps of Engineers ("Corps").[2] The court below held that the Secretary has no such authority.

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[2] The main stem reservoirs are those built by the Corps along the main channel of the Missouri River. In addition, there is a network of approximately ninety smaller reservoirs built by the Bureau of Reclamation of the Department of the Interior on the tributary streams of the Missouri.

As is explained in this petition, however, much more is involved here than the validity of ETSI's single contract with the Secretary. For in striking down that contract, the court below effectively determined that virtually none of the vast amounts of water stored in the six Corps-operated main stem reservoirs in the arid States of the Upper Missouri Basin [3] may be made available for *any* beneficial consumptive use whatever. This determination not only deprives that region of access to vitally needed water, it also thwarts the federal interests in maximizing the beneficial use of water stored in federal reservoirs and in recouping the storage costs from private parties who can use the water. Moreover, the decision completely overrides the rights of the States—such as South Dakota in the present case—to control the use of waters within their borders. All of these results are plainly contrary to the delicate balancing of federal and state interests devised by Congress in the Flood Control Act of 1944.

Furthermore, and perhaps most significantly, in striking down ETSI's contract with the Secretary, the court below rejected out of hand the long-standing and jointly-held position of the two agencies charged with execution of the Flood Control Act: the Department of the Interior and the Corps. The court took this step notwithstanding Congress' implicit adoption of those agencies' construction of the Act and this Court's repeated instructions to the lower courts to defer to such agency constructions. For all these reasons, as more fully explained below, this case warrants the Court's review.

B. ETSI's Contract.

In 1981, ETSI obtained a water use permit from South Dakota permitting it to appropriate 50,000 acre feet of water per year out of Lake Oahe, which is located

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[3] The Upper Missouri Basin includes the States of South Dakota, North Dakota, Montana, Colorado and Wyoming. The Lower Basin includes the States of Iowa, Nebraska, Kansas and Missouri.

entirely within South Dakota. ETSI intended to transport the water by aqueduct to the Powder River Basin in Wyoming to be mixed with coal, and then to move the slurry mixture through a coal slurry pipeline to coal-fired power plants in the southeastern United States. As a condition of the South Dakota permit, the State required ETSI to deliver water to several South Dakota communities along the pipeline route that lack adequate supplies of potable water. ETSI also promised not to exercise its rights under a Wyoming permit to withdraw water from the Madison Formation Aquifer, an important water source for both Wyoming and South Dakota.

Armed with its state water use permit, ETSI petitioned the Secretary of the Interior for a forty-year water service contract permitting it to withdraw 20,000 acre feet of water per year from Lake Oahe. After consultation with the Corps, the Secretary of the Interior approved the contract, relying on his authority under Section 9 of the Flood Control Act.[4] The Corps then issued a permit allowing ETSI to construct a water intake structure to remove the water from Oahe.

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[4] Section 9(a), discussed further below, provides that:

> The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

Section 9(c), also discussed below, provides in pertinent part that:

> Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws . . . .

The States of Iowa, Missouri and Nebraska, the Kansas City Southern Railway, several farmers groups and the Sierra Club filed suit against ETSI, the Secretary and the Corps in the United States District Court for the District of Nebraska, challenging the federal permits and approvals. One of the plaintiffs' many allegations was that the Secretary of the Interior did not have authority under the Flood Control Act to enter the contract with ETSI.[5] Because the lower courts accepted this contention and because the Secretary's authority forms the centerpiece of this petition, it is important next to describe the source of that authority.

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[5] Significantly, the plaintiff States did not challenge the water permit issued by South Dakota, although the relief they sought would effectively preclude South Dakota from realizing the benefits of that permit. South Dakota therefore sought, but was denied, leave to intervene in this action. It participated in both the District Court and the Eighth Circuit as amicus curiae.

Furthermore, after the District Court struck down its contract with ETSI, South Dakota moved for leave to file an original action in this Court against the plaintiff States in this case. *South Dakota v. Nebraska, Iowa and Missouri*, No. 103 Original (filed Aug. 16, 1985). Filing as amicus in response to South Dakota's motion, the United States acknowledged that the present case "actually presents a dispute with South Dakota over the use and allocation" of waters impounded within the borders of that State and, thus, entails an interstate conflict. Brief for the United States as Amicus Curiae at 11 (Feb. 1986). Nevertheless, the United States suggested that equitable and prudential considerations favored withholding a decision on South Dakota's motion for leave to file an original action because the present case might "resolve the present dispute or serve to sharpen the focus of the controversy." *Id.* On March 31, 1986, this Court denied South Dakota's motion without prejudice. 106 S. Ct. 1487 (1986).

Following the Eighth Circuit decision in the case, South Dakota renewed its motion for leave to file a complaint in this Court. That motion is currently pending.

C. The Secretary's Authority Under the Flood Control Act of 1944.

The Secretary of the Interior approved the ETSI contract pursuant to Section 9 of the Flood Control Act of 1944 (the "Act").[6] That Act authorized a nationwide program for the development of the country's water resources and the promotion of economic growth in the post-World War II years.[7] Two key compromises underlie the inclusion of the Missouri River Basin in this program.[8] These compromises, enacted as Sections 1(b) and 9 of the Act, resolved two sets of conflicts—one between the States of the Upper and Lower Missouri River Basin, the other between the Bureau and the Corps. Both compromises clarify the role that Congress intended the Secretary to play in administering the Act's program in the western States.

The first compromise was between the States. The Upper Basin States had interests roughly parallel to the Bureau's. These arid or semi-arid States, which lie largely west of the ninety-eighth meridian, sought to develop the Missouri River for irrigation and other beneficial consumptive water uses. The Bureau is charged with promoting agriculture and other economic development in the seventeen arid western States, including those in the Upper Basin.[9] It therefore planned a system of main stem and tributary dams, formalized for

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[6] Pub. L. No. 78-534, 57 Stat. 887.

[7] M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan* 71-72 (1955) (hereinafter "*Ridgeway*").

[8] The Missouri Basin encompasses one-eighth of the land mass of the United States. *Id.* at 47.

[9] *See* 43 U.S.C. § 391 (1982).

Congress in the Sloan Report,[10] which was designed to further the Bureau's and the Upper Basin States' interests in the Basin. *See Ridgeway* at 83-86.

By contrast, the Lower Basin States' interests were more congruent with those of the Corps. These States had suffered years of devastating floods along the Missouri; they sought the expertise of the Corps in regulating the flow of the river. They also shared the Corps' interest in enhancing the navigability of the Missouri. Consistent with these interests, therefore, the Corps devised a plan, presented to Congress as the Pick Report,[11] geared towards flood control and navigation. *See Ridgeway* at 78-79.

Both the Upper and the Lower Basin States feared that the other's interests would preempt their own when the Basin was developed. Similarly, neither the Bureau nor the Corps was willing to cede control over the region to the other agency. A long and contentious debate in Congress was the result. Congress' compromise of the States' interests was Section 1(b) of the Act, 33 U.S.C. § 701-1(b) (1982), which provides that the use of water for navigation east of the ninety-eighth meridian (*i.e.*, in the Lower Basin States) shall be subordinate to "any beneficial consumptive use, present or future," in the arid States west of that meridian.[12] With that com-

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[10] S. Doc. No. 191, 78th Cong., 2d Sess. (1944). The Sloan Report was prepared by Bureau of Reclamation Assistant Regional Director Sloan after a five-year study of the physical features and economic development of the Basin.

[11] H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944). The Pick Report was prepared by Colonel Pick of the Corps at the request of Congress after serious floods in the Lower Basin in 1943 and 1944.

[12] *Missouri River Basin Industrial Water Marketing: Hearing Before the Subcomm. on Energy Research and Water Resources, Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess., Part 1, at 55 (1975) ("1975 Hearings").

promise in place, the Upper Basin States were willing to give up land within their borders for the construction of the dams that the Corps believed were necessary to its flood control and navigation purposes. At the same time, the Lower Basin States agreed to the construction of reservoirs with ample storage space for irrigation and other consumptive uses, recognizing that in times of shortage the consumptive uses would have priority. *Ridgeway* at 163-164. This concession by the Lower Basin States ensured that the Secretary, through the Bureau, would play a major role in the Basin's development.

The second critical compromise in the Act was between the competing interests of the Bureau and the Corps. The two agencies realized that the ultimate success of the program would depend upon "coordinat[ing] fully the activities of both agencies." H.R. Doc. No. 475 at 3. Senate Document No. 247 [13] therefore reconciled the differences between the Corps' Pick and Bureau's Sloan Reports. Congress adopted all three documents, now known as the Pick-Sloan Plan, and expressly incorporated them as the "general comprehensive plans" for basin-wide development in Section 9 of the Act.

Three key themes emerge from the Plan documents adopted by Congress in Section 9. First, the Plan was intended to facilitate the full development of the water resources of the Missouri Basin for all uses through close cooperation and coordination between the Bureau and the Corps.[14] Second, both the Bureau and the Corps understood and agreed to the principle of "coordinate jurisdiction," *i.e.*, jurisdiction over Missouri Basin reser-

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[13] S. Doc. No. 247, 78th Cong., 2d Sess. (1944).

[14] The Pick Report, for example, described the plan as one that would "provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes" and would thereby tend to stabilize "the economic life of the valley and . . . interstate commerce" as well as encourage "industrial and civic developments." H.R. Doc. No. 475 at 28-29.

voirs was not to be allocated according to which agency built a particular reservoir, but rather each agency was assigned responsibility at *each* reservoir according to the functions within that agency's areas of expertise.[15] Finally, the Plan acknowledged that all of the details of the Basin's development had not been—and could not have been—addressed in the Act. Rather, those details were necessarily entrusted to the two agencies, who were made jointly responsible for the most efficient use of the Basin's resources.[16] It is those details which the Secretary and the Corps worked out concerning what has proved to be excess irrigation storage in the main stem reservoirs, including Lake Oahe.

D. Application of the Secretary's Authority to Lake Oahe.

Specifically referencing the Pick-Sloan documents, Section 9(c) of the Act authorizes the Secretary of the In-

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[15] The Sloan Report described this coordinate jurisdiction in some detail:

> *The agency with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature,* giving full recognition, in the design, construction, and operation, to the needs of other agencies with minor interests. All reservoirs where flood control and navigation are dominant should be operated by the Corps of Engineers and where the flood control and navigation functions are minor, the reservoirs should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. *All irrigation features should be operated by the Bureau of Reclamation or its agents.* All reservoirs in which irrigation, restoration of surface and ground waters, or power, is dominant, should be operated by the Bureau of Reclamation. *Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned.*

S. Doc. No. 191 at 11 (emphasis supplied); *accord* H.R. Doc. No. 475 at 3-4. *See also* S. Doc. No. 247 at 1.

[16] The Sloan Report explained that the Plan "is adapted to development in stages, and to such modifications as changes in physical and economic conditions make necessary." S. Doc. No. 191 at 17.

terior to administer the "reclamation developments" of the Missouri Basin in accordance with general federal reclamation law. Among the Secretary's most basic powers under the reclamation law is the power "to enter into contracts to furnish water for municipal water supply or miscellaneous purposes," provided the contracts "will not impair the efficiency of the project for irrigation purposes." Section 9(c), Reclamation Project Act of 1939, 43 U.S.C. § 485h(c) (1982). Having found that the ETSI contract would not impair the irrigation function of Lake Oahe and that the irrigation storage in the lake constituted a "reclamation development" within the intent of Section 9, the Secretary approved the ETSI contract.

There is no dispute that the Secretary has the reclamation law authority to market water for industrial purposes at "reclamation developments." *E.g.*, *Environmental Defense Fund, Inc.* v. *Andrus*, 596 F.2d 848 (9th Cir. 1979). The dispute is whether the Secretary's Section 9(c) authority over "reclamation developments" includes Lake Oahe's irrigation storage.[17] The Pick-Sloan Plan demonstrates that Congress did intend the Secretary to have authority over such storage. Moreover, the Secretary has consistently determined that he has such authority, and that determination has been repeatedly confirmed by congressional action.

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[17] As provided for in the Pick-Sloan Plan, Lake Oahe was built with a capacity of 23,500,000 acre feet to permit, among other things, the irrigation of 750,000 acres of farmland in the adjacent James River Basin of South Dakota. S. Doc. No. 247 at 3. Construction of the lake was completed in 1962, and 18.1 percent of its costs were to be reimbursed through reclamation functions within the jurisdiction of the Bureau. 128 Cong. Rec. S8480 (daily ed. July 16, 1982). Because irrigation demand has not developed as anticipated, however, even the initial stages of the James River irrigation project were never completed. *See* WEB Rural Water Development Project Act of 1982, Pub. L. No. 97-273, §§ 3a and 4,

E. Congress' Confirmation of the Secretary's Construction.

The Secretary has long interpreted his authority under Section 9 of the Act to extend to the disposition of irrigation storage in Corps-operated reservoirs such as Lake Oahe. He has also joined with the Corps in presenting these views to Congress on several occasions. At no time has Congress challenged that interpretation. Indeed, in 1982 Congress acted to preserve the Secretary's interpretation of his authority.

Congress first reviewed the "coordinated agreement" for Missouri Basin development as early as 1955. At that time, a Senate Report noted: "[T]he Secretary of the Interior is responsible for the disposal of water for irrigation or *space reserved for this purpose in any of the dams in the Missouri River Basin* project, while the Secretary of the Army is responsible for flood-control regulation." (Emphasis supplied).[18]

Twenty years later, in an effort to facilitate private development of western energy resources, the Bureau and the Corps entered into a Memorandum of Understanding ("MOU").[19] In that document, the two agencies agreed to engage in a cooperative effort to market water for energy development from the Missouri River's main stem reservoirs. The Secretary of the Interior was to take the lead in contracting for such water uses, while the Secre-

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96 Stat. 1181, 1182. As a result, none of the water stored in Lake Oahe for irrigation has been used for that purpose.

Virtually the same situation exists at the other main stem reservoirs built to include irrigation storage. Although substantial irrigation occurs at the tributary reservoirs, the irrigation projects envisioned for the main stem reservoirs have not been needed.

[18] S. Rep. No. 1066, 84th Cong., 1st Sess. 3 (1955) (approving construction of two of the tributary dams of the Missouri Basin project, one by the Corps and the other by the Bureau).

[19] The MOU had an initial term of two years, and was later extended through 1978.

tary of the Army was to retain operational control over the reservoirs.[20]

Upon learning of the MOU, Congress convened hearings to review the statutory basis for the water marketing program. In their joint response to Congress, the two agencies explained that their marketing program relied on the authority of the Secretary of the Interior under Section 9 of the Flood Control Act and Section 9(c) of the Reclamation Project Act of 1939.[21] Moreover, they specifically pointed to the ETSI coal slurry pipeline as one of the projects that might benefit from the program. 1975 Hearings at 9. Significantly, Congress took no post-

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[20] Pursuant to the MOU and after consultation with Basin States, the Secretary of the Interior concluded that two million acre feet of irrigation storage in the main stem reservoirs would not be needed for at least forty or fifty years. The Corps found that one-half that amount could be marketed for energy/industrial uses without affecting the functions within its jurisdiction. 1975 Hearings at 5-6, 23.

[21] Prior to the execution of the MOU, the Acting General Counsel of the Army prepared an opinion which concluded that the Secretary of the Interior has authority to enter into industrial water marketing contracts for irrigation storage at main stem Missouri River reservoirs pursuant to Section 9(c) of the Act. Memorandum for the Chief, Office of Civil Functions, United States Army Corps of Engineers, from Richard V. Kearney, Acting General Counsel (December 16, 1974) (hereinafter "Kearney Opinion"). He further expressed the view, however, that the Secretary of the Interior could not act on such contracts independently. He noted that the Corps should determine whether a proposed industrial use "would interfere with the operation of the reservoirs for flood control." *Id.* at 7.

Following the execution of the MOU, the Corps concluded that at least one million acre feet of irrigation storage could be made available for energy/industrial uses without impairing any other project purpose. 1975 Hearings at 6. Thus, when the Secretary of the Interior signed the ETSI contract, the Corps had already performed its assigned role. No further Corps approval was necessary.

hearing action to amend the law or in any way limit the Secretray's asserted contracting authority.[22]

Even more significantly, in 1982 the Bureau and the Corps again explained to Congress their understanding of the scope of the Secretary of the Interior's industrial water marketing authority under Section 9 of the Act. Congress was at that time considering legislation designed primarily to lift acreage restrictions from certain agricultural lands irrigated from Corps-built reservoirs. *See* Reclamation Reform Act of 1982, § 212(a), 43 U.S.C. § 390*ll*(a) (1982). Congress was concerned, however, that this legislation might undercut the Secretary's ability to recoup the costs of including irrigation storage at Corps-built reservoirs. Commissioner of Reclamation Broadbent assured the Senate that Section 212(b) of the same bill (enacted at 43 U.S.C. § 390*ll*(b) (1982)) would ensure that the *pre-existing* recoupment scheme would be unaffected: as the Commissioner stated, Section 212(b) "assure[s] that the Secretary of the Interior's authority to contract with water users for irrigation water supplies from Corps of Engineers projects continues in effect and is not inhibited in any way." 128 Cong. Rec. S8476 (daily ed. July 16, 1982).

General Heiberg of the Corps further explained: "It is general Corps policy to apply Reclamation law to those projects . . . which have irrigation as an authorized purpose." *Id.* at S8478. He added, "the irrigation fea-

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[22] Only one contract was executed while the MOU was in effect. In December 1978, the Secretary of the Interior signed a water service contract with ANG Coal Gasification Company for 17,000 acre feet of water per year from Lake Sakakawea, another main stem reservoir, for a coal gasification project. He signed a similar contract in November 1979, eleven months after the MOU expired, with Basin Electric Power Cooperative for 19,000 acre feet of water per year, also from Lake Sakakawea, for a steam-generated electric power facility. Both of these contracts were based on the same statutory grants of authority as the ETSI contract, and both projects proceeded without challenge. Nevertheless, these contracts are of doubtful validity following the Eighth Circuit's decision.

ture is normally turned over to [the Bureau of Reclamation] so it can market the water in accordance with its policies and procedures." *Id.* Moreover, he explicitly noted that, under Bureau policies and procedures, some project reimbursement would come from industrial water users like ETSI: "A portion of the mainstem storage space set aside for irrigation *has been contracted for by industrial water users for interim water supplies which will bring a substantial amount of revenue to the United States.*" *Id.* at S8480 (emphasis supplied).

Satisfied with these assurances of the scope of the Secretary's contracting authority and the applicable recoupment provisions of federal reclamation law, Congress passed the described 1982 amendments, leaving Section 9 of the Act—as interpreted by the Corps and the Bureau—unchanged.

F. Rejection of the Secretary's Authority by the Courts Below.

Notwithstanding this long-held and reasonable construction of the Flood Control Act by its executing agencies and Congress' confirmation of that construction, the courts below struck it down. The District Court ruled that the Secretary did not have the authority to execute the ETSI contract because Lake Oahe was not itself a "reclamation development." For this conclusion, the court relied on the undisputed but irrelevant facts that: (1) Lake Oahe was built and is operated by the Corps; (2) its dominant purpose was flood control, and it has never been used for irrigation; and (3) there is no identifiable block of water specifically designated for "irrigation," but rather multiple use storage for navigation, power and irrigation.[23] Pet. App. 54a-55a, 56a-57a, 63a-64a.

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[23] Although neither the Corps nor the Bureau had encountered any practical difficulties in exercising the requisite coordinate jurisdiction, the District Court could not see "how the Interior Department is to control what cannot be identified." Pet. App. 64a.

The majority decision of the Eighth Circuit likewise rejected the Secretary's interpretation of the Act, on the ground that the Secretary's jurisdiction under Section 9 does not extend to irrigation storage in a Corps-built reservoir unless the water is actually used for irrigation purposes. Pet. App. 27a-28a, 30a. The majority refused to accord any deference to the Secretary of the Interior's contrary interpretation of the Act, reasoning that no deference is required on questions concerning "the limits of [the] agency's statutory authority." *Id.* 33a.

Judge Bright in dissent found that the majority had misconceived the court's role in reviewing an agency's construction of a statute that it administers. Concluding that the Secretary of the Interior's "long-standing and thoroughly reasoned construction" of Section 9 of the Act, *id.* 38a, was a reasonable one, he would have reversed the District Court's ruling and upheld the Secretary's authority. *Id.* 43a-44a.

An evenly-divided (5-5) *en banc* Court of Appeals denied ETSI's petition for rehearing. Under the Eighth Circuit's local rule, Senior Judge Bright did not participate in the vote on the rehearing petition. Significantly, with but one exception, every judge from a Lower Basin State voted to deny the petition while every judge from an Upper Basin State voted to rehear the panel's 2-1 decision.[24]

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[24] In a separate proceeding below, respondents sought dismissal of the appeal on the ground of mootness. The Eighth Circuit therefore remanded the case for factual findings on that issue. Following discovery and a hearing, the District Court found as a matter of fact that the ETSI contract was still valid, had not been terminated or abandoned, and was assignable under some conditions. He therefore rejected respondents' claims of mootness. Based on the District Court's findings, the Eighth Circuit affirmed. These factual determinations conclusively demonstrate that a live controversy is presented by ETSI's petition and there is therefore no need for this Court to consider that issue further. *See Washington Metropolitan Transit Authority* v. *Johnson*, 467 U.S. 925, 928 n.5 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 622-23 (1982).

REASONS FOR GRANTING THE WRIT

For three reasons, the described controversy over the Secretary's authority is of such significance that it merits review by this Court. First, the invalidation of the Secretary's authority by the court below effectively renders unavailable for consumptive use an important water resource in the western part of the country. The invalidation also jeopardizes a federal program designed to facilitate the maximum beneficial use of that resource and to pay the costs of maintaining that resource through private contracts. Second, the invalidation of the Secretary's authority rests on a construction of federal law that totally negates any prerogative of the affected States to control water use within their own borders. Finally, by rejecting the Secretary's interpretation of the statute, the court below has not only ignored Congress' approval of that interpretation, but it has also undermined clear principles established by this Court requiring deference to such agency interpretations.

1. *The Decision Below Threatens the Strong Federal Interest in Efficient, Beneficial Use of the Nation's Water Resources.*

By adopting and incorporating the Pick-Sloan Plan in Section 9 of the 1944 Flood Control Act, Congress intended that the Plan would take into account "[e]very water resource and all feasible beneficial uses of water" in order to arrive at a "basin-wide plan most likely to yield the greatest good to the greatest number of people." S. Doc. No. 191 at 17. The hallmark of the Plan was flexibility, allowing the two agencies responsible for its implementation to adopt "such modifications as changes in physical and economic conditions make necessary." *Id.* A key feature built into the Plan to preserve this flexibility was the concept of shared jurisdiction. The Plan "[did] not vest primary rights in anybody." [26] Rather, it

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[26] *Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong., 2d Sess. 669 (1944)

"rest[ed] upon the basic concept that water is to be used by the people who can use it." [25]

By undercutting this concept of shared jurisdiction, the Eighth Circuit's ruling subverts two important federal interests underlying the Flood Control Act: (1) it deprives the administering agencies of their Section 9 flexibility to adapt to changing conditions in the Basin, effectively rendering irrigation storage in the main stem reservoirs unavailable for any new consumptive use; and (2) it cripples Congress' repayment scheme for irrigation storage in Corps-built reservoirs, a scheme Congress reaffirmed only four years ago.

(a) *The decision below leaves water stored for irrigation in main stem reservoirs unavailable for any new consumptive use.*

The courts below treated this case as nothing more than a debate over which of two federal agencies is the appropriate marketing authority for irrigation water stored in Corps-operated reservoirs; they assumed that the Corps has this authority pursuant to Section 6 of the Act. This assumption is erroneous.

In fact, virtually no water stored in the main stem reservoirs can be made available under Section 6. That section permits the Corps to contract only "for domestic and industrial uses for *surplus* water that may be available at any reservoir under the control of the [Corps]: *Provided*, That no contracts for such water shall ad-

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(remarks of Colonel Reber) ("1944 Senate Hearings"). As Colonel Reber (a principal proponent of the Plan from the Corps) acknowledged to Congress at the time of the Act's passage, "all of the details of this great Missouri program will not be worked out for 10 years or 20 years or even more." *Id.* at 668-69.

[25] *Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works*, 85th Cong., 1st Sess., Part 2, at 320 (1957) (remarks of Senator O'Mahoney).

versely affect then existing lawful uses . . . ." 33 U.S.C. § 708 (1982) (emphasis supplied). The described "surplus water" is either water never earmarked for a particular purpose [27] or water not currently being used for any authorized project purpose.[28] The water ETSI contracted for is not "surplus" under either definition. That water was originally earmarked for irrigation and, in the interim, runs through the turbines at the Oahe dam to generate hydroelectric power; both irrigation and power generation are authorized project purposes. For this reason, the Acting General Counsel of the Army has expressly determined that the Corps is *not* free to market such water under Section 6 of the Act. Kearney Opinion at 7. The Eighth Circuit has therefore contradicted the construction of the Act of both agencies charged with its administration.

More significantly, as Judge Bright recognized in his dissent, the result of the Eighth Circuit's decision is that *no* federal agency has the power to authorize beneficial consumptive uses of irrigation water such as that stored in vast Lake Oahe. Pet. App. 38a n.4. Congress clearly did not intend such an absurd result.

Instead, in approving the Pick-Sloan Plan, Congress anticipated that Lake Oahe, like other multiple-purpose

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[27] 90 Cong. Rec. 4133 (1944) (remarks of Rep. Curtis); *see also* 1975 Hearings at 31.

[28] Corps of Engineers Project Purpose Planning Guidance, Regulation ER 1105-2-20, section 7-3(c) (January 29, 1982). Pursuant to the Water Supply Act of 1958, Pub. L. No. 85-500, § 301, 72 Stat. 319 (codified as amended at 43 U.S.C. § 390b (1982)), the Corps has adopted a regulation authorizing contracts for the lesser of 15 percent or 50,000 acre feet of water from any reservoir for municipal or industrial users. *Id.*, section 7-3(b). This is an insignificant amount of water—less than .2 percent of the volume of Lake Oahe—and thus this authority is not a meaningful alternative to the authority of the Secretary of the Interior under Section 9(c).

reservoirs in the Basin,[29] would face changing conditions that would require flexible responses by the agencies in order to achieve the Act's overarching objective: "the most efficient utilization of the waters of the Missouri River Basin for all purposes." H.R. Doc. No. 475 at 29. The ETSI contract and others like it reflect the Secretary's considered judgment concerning how best to meet this objective in light of the unforeseen circumstance of substantial excess irrigation storage. This is precisely the kind of adaptation to changing conditions that was written into the Pick-Sloan Plan and Section 9 of the Act. *See* S. Doc. No. 191 at 17. The Eighth Circuit's decision has written such flexibility out of the Act and has thereby decreed that valuable water will be unavailable for any consumptive use.[30]

(b) *The decision below deprives the federal government of the ability to obtain repayment for the irrigation storage included in Corps-built reservoirs.*

Recoupment of costs from project beneficiaries is a fundamental principle underlying reclamation law. 1944 Senate Hearings at 201.[31] In planning projects with irrigation storage, the Bureau assumes that irrigation users

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[29] Although the Pick-Sloan Plan called for the construction of a system of approximately ninety reservoirs, S. Doc. No. 247 at 1-5, Lake Oahe is the second largest, accounting for more than twenty percent of the total storage capacity of the Basin reservoirs, *id.*; 1975 Hearings at 30.

[30] Under the Eighth Circuit's construction of Section 9, the only conceivable circumstance in which the irrigation storage could become available for consumptive use would be if the Secretary of the Interior first constructed unnecessary irrigation works for the water. Congress clearly did not intend that such needless construction occur and the possibility that it would be authorized is remote.

[31] By contrast, flood control and navigation, functions that fall within the Corps' jurisdiction, are not reimbursable. *E.g.*, *Ridgeway* at 144.

will repay a major portion of the construction costs. And when irrigation storage is included in a Corps project, a portion of the project costs is specifically allocated to the reimbursable features. 128 Cong. Rec. S8480 (daily ed. July 16, 1982). As previously stated, such an allocation occurred in the case of Lake Oahe. *See supra* n.17. Moreover, Congress has recently acknowledged that the reclamation program "has evolved through the decades and is now a major water resource program involving major river basin development projects providing hydroelectric power, municipal and *industrial water supply*, fish and wildlife conservation, flood control, and public recreation in addition to the original irrigation purpose." [32] Thus, Congress and the Bureau look to non-irrigation users to contribute to the repayment of project costs such as the irrigation storage in Lake Oahe. *Id.* at 2573.

Yet, under the Eighth Circuit's decision, such repayments will not be available to the federal government, notwithstanding Congress' 1982 action expressely endorsing repayment to the Secretary through contracts like ETSI's.[33] Such a blow to the Secretary's ability to implement and fund a program crucial for delivery of the nation's water resources merits this Court's review.

2. *The Decision Below Jeopardizes the Rights of the States to Control Water Uses Within Their Borders.*

The Flood Control Act declares that it is "the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control . . . ." 33 U.S.C. § 701-1. The decision below flies in the face of this clear

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[32] S. Rep. No. 373, 97th Cong., 2d Sess. 8 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2570, 2572 (emphasis supplied).

[33] *See* discussion *supra* pp. 15-16.

policy. It does so, first and most obviously, by effectively overturning the permit South Dakota issued to ETSI. More importantly, it does so by putting all irrigation water stored in Corps reservoirs in the Missouri Basin beyond the jurisdiction of any federal agency and, therefore, beyond any State control over that water—in direct contradiction of Congress' policy to accommodate state water interests whenever possible. Furthermore, the decision below strips the federal agency that has a long history of cooperation with States and respect for state water law of any voice in the distribution of water stored in Corps reservoirs. This grave, unwarranted encroachment on state interests merits this Court's review.

As previously discussed, the state interests here at stake are fundamental ones. Sections 9 and 1(b)[34] both reflect a balancing of the interests of the Lower Basin States in flood control and navigation and the interests of the Upper Basin States in irrigation against other consumptive uses of water. *See* discussion *supra* pp. 8-10.

The Lower Basin States realized the benefits of the Act as soon as the main stem dams and reservoirs were built, thereby permitting the regulation of stream flows. By contrast, the Upper Basin States, who gave up thousands of acres of their land to permit the creation of the reservoirs, have gained very little because the large-scale irrigation projects they were intended to enjoy have proved infeasible. Industrial water marketing, which was to be carried out by the Secretary of the Interior in conjunction with the States, offered the Upper Basin States the promise of some tangible benefit from these reservoirs. *See* 1975 Hearings at 7; 128 Cong. Rec. S11305, S11308 (daily ed. Sept. 10, 1982). The Eighth Circuit ruling removes the possibility of that benefit as well. The effect of this ruling is to eviscerate the two compromises that were instrumental to the passage of the Act.

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[34] 33 U.S.C. § 701-1(b).

Moreover, until the Eighth Circuit's ruling, the Upper Basin States looked to the Bureau's unique expertise in meeting their needs for consumptive uses of water. In developing that expertise, the Bureau has also established a tradition of deference to state water laws. Since its inception, federal reclamation law has been based on a "purposeful and continued deference to state water law," *California* v. *United States*, 438 U.S. 645, 653 (1978), and it is now settled that, in the absence of a *specific* contrary directive from Congress, the Bureau must adhere to state law, *id.* at 678. The Corps has no such tradition or expertise. Thus, by divesting the Secretary of the Interior of his role in administering the irrigation storage of the main stem reservoirs, the Eighth Circuit has left the Upper Basin States without the safeguard of an agency that has the clear, established obligation to protect their rights.

This Court has long recognized the great importance of state water rights issues such as those presented in this case. *E.g.*, *California* v. *United States*, *supra*; *Arizona* v. *California*, 373 U.S. 546 (1963); *see also Sporhase* v. *Nebraska*, 458 U.S. 941 (1982). It has also recognized the importance of reviewing collisions between States over such water rights,[35] as well as collisions between the federal government and the States over those rights.[36] This case presents both kinds of collisions, and it therefore merits this Court's review.

3. *The Decision Below Directly Conflicts with Decisions of this Court Requiring Judicial Deference to Reasonable Agency Constructions of Their Enabling Statutes.*

Finally, this case merits review because the Eighth Circuit's decision violates an important principle of def-

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[35] *E.g.*, *Colorado* v. *New Mexico*, 467 U.S. 310 (1984); *Sporhase* v. *Nebraska*, *supra*; *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945).

[36] *E.g.*, *California* v. *United States*, *supra*; *Arizona* v. *California*, *supra*; *United States.* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

erence to agency expertise established by this Court. Three Terms ago this Court declared that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of [an] agency" charged with enforcement of the statute. *Chevron U.S.A.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). In the three succeeding years, the Court has *unqualifiedly* applied this standard of deference to agency interpretations.[37] Nevertheless, the Eighth Circuit in the present case has refused to follow *Chevron*, distinguishing it in a way that jeopardizes the continuing vitality of that decision.

As discussed, the question in this case is whether, within the meaning of Section 9 of the Flood Control Act, the term "reclamation . . . developments to be undertaken by the Secretary of the Interior" covers disposition of the irrigation water stored in the Oahe Reservoir. The Secretary has construed the term to include the Oahe irrigation water. The Eighth Circuit, based on its

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[37] *See, e.g., Commodity Futures Trading Comm'n* v. *Schor*, 106 S. Ct. 3245 (1986) (deferring to Commissioner's interpretation of CFTC's adjudicatory power to include compulsory counterclaims); *Young* v. *Community Nutrition Inst.*, 106 S. Ct. 2360 (1986) (deferring to Food & Drug Administration's interpretation of mandate to promulgate regulations for toxic substances to allow discretion); *Federal Deposit Ins. Corp.* v. *Philadelphia Gear Corp.*, 106 S. Ct. 1931 (1986) (deferring to FDIC's interpretation of "deposit" to exclude standby letters of credit backed by contingent promissory notes); *United States* v. *City of Fulton*, 106 S. Ct. 1422 (1986) (deferring to Energy Secretary's interpretation of 1944 Flood Control Act to permit interim increases in power rates); *United States* v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985) (deferring to Corps' interpretation of "navigable waters" to include adjacent wetlands); *Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524 (1985) (deferring to HHS Secretary's interpretation of "institution for mental diseases" to include some "intermediate care facilities"); *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985) (deferring to EPA Secretary's interpretation of "modify" to allow variances for "fundamentally different factors").

own "review of the Act and its legislative history," was "convince[d]" that the term did not include such water. Pet. App. 33a. It therefore rejected the Secretary's construction.

Contrary to the command of *Chevron*, however, the Eighth Circuit never even considered whether the Secretary's construction of his Section 9(c) authority was *a reasonable* interpretation of the statute and therefore binding on the courts. Instead, the Court of Appeals first construed the statute on its own and then held that the Secretary's construction was entitled to no deference because his interpretation of his "statutory mandate" was *incorrect*.

The court's sole justification for this inversion of *Chevron* was its contention that "[t]he *Chevron* rule requires deference only where an agency reasonably construes the applicable statute *on a matter which is within its jurisdiction to decide*." Pet. App. 33a (emphasis supplied). Having already determined on its own construction of Section 9, the court reasoned that the Secretary's "assertion of . . . authority" over Oahe water was "beyond his statutory mandate *and therefore not entitled to judicial deference*." *Id.* at 33a-34a (emphasis supplied). Under that analysis, a court would be free to substitute its judgment for the agency's in *every* case where the agency's "jurisdiction" or the scope of its "statutory mandate" could be said to be at issue. There are very few agency decisions which could not be so characterized, as this Court's decisions in *Chevron* and its progeny clearly demonstrate.

For example, *Chevron* itself presented the question whether a permit system established under the Clean Air Act was applicable to certain state industrial plants. That applicability turned on the EPA's construction of the statutory term "stationary sources," an agency construction which this Court said was owed deference. 467 U.S. at 844-45, 864-66. Yet under the Eighth Cir-

cuit's analysis, the EPA's construction could presumably have been ignored by the courts because it was determinative of the *jurisdictional* reach of the agency's authority.

Similarly, in *United States* v. *Riverside Bayview Homes, Inc.*,[38] a post-*Chevron* case much like the present one, the question was whether the Army Corps of Engineers' jurisdiction over "navigable waters" under the Clean Air Act encompassed certain wetlands adjacent to bodies of water. Citing *Chevron*, this Court held that, where the Corps had determined that it had authority over such wetlands, the judiciary's role was "limited to the question whether it is reasonable . . . for the Corps *to exercise jurisdiction over* [*the*] *wetlands* . . . ." 106 S. Ct. at 461 (emphasis supplied). This was so even though the Court defined the issue as "a problem of *defining the bounds of* [*the agency's*] *regulatory authority*." *Id.* at 462 (emphasis supplied). The Eighth Circuit's interpretation of *Chevron* simply cannot be squared with *Riverside Bayview Homes*.[39]

Furthermore, if there be any doubt that the Eighth Circuit has misconstrued its role under *Chevron*, this

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[38] 106 S. Ct. 455 (1985).

[39] The Eighth Circuit's analysis is also at odds with *United States* v. *City of Fulton*, 106 S. Ct. 1422 (1986). That case concerned the authority of the Secretary of Energy to implement certain interim rate increases under section 5 of the 1944 Flood Control Act. The Secretary had concluded that he had such authority. As in this case, the lower court held that "the Secretary's actions exceeded his contractual and statutory authority. . . ." *Id.* at 1424. Citing *Chevron*, this Court reversed, stating that even though Congress had not expressly authorized the increases, the Secretary's interpretation represented "a reasonable accommodation of the policies underlying [the] Act." *Id.* at 1430. Accordingly, it deferred to that interpretation. *See also Federal Deposit Ins. Corp.*, 106 S. Ct. at 1938-39 (relying on *Chevron* to uphold FDIC's determination that certain standby letters of credit fell outside its jurisdiction over "deposits"); *Chemical Manufacturers Ass'n*, 470 U.S. at 134 (*Chevron* precludes court from rejecting EPA's reasonable construction of its statutory authority).

Court's most recent explanation of the *Chevron* principle surely removes that doubt. In *Commodity Futures Trading Commission* v. *Schor*,[40] the CFTC had determined that its jurisdiction under the Commodity Exchange Act allowed it to entertain state law counterclaims in reparation proceedings. The Court of Appeals refused to defer to this CFTC determination, in part because that court believed it possessed "superior expertise" on questions of agency "jurisdiction;" the court's rationale was that a "statutory interpretation-jurisdictional question . . . is precisely the kind with which courts customarily deal." *Schor* v. *Commodity Futures Trading Commission*, 740 F.2d 1262, 1279 (D.C. Cir. 1984).

This Court reversed, and in so doing expressly rejected the claim that "jurisdictional" issues are exempt from the deference requirement:

> [T]he Court of Appeals was incorrect to state on the facts of this case that the CFTC's expertise was not deserving of deference because of the "statutory interpretation-jurisdictional" nature of the question at issue. An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is "reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes" of the Act of the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference.

106 S. Ct. at 3254-55 (citation omitted). The decision below is plainly at odds with this reasoning.[41]

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[40] 106 S. Ct. 3245 (1986).

[41] The Eighth Circuit majority proposed to justify its departure from cases such as *Riverside Bayview Homes* on two grounds. First, the court contended that "jurisdictional" questions are ordinarily matters of "a legal conclusion based solely on [a] reading of the statutory language—a function courts are capable of performing." Pet. App. 34a n.25. This was precisely the same reasoning used by the D.C. Circuit in *Schor*, which this Court decisively

If the Eighth Circuit's broad exception to *Chevron* is allowed to stand—if the lower courts are free to substitute their judgments for the agencies' in all cases where the scope of the agencies' jurisdictional authority can be said to be at issue—little will be left of the *Chevron* decision. The Court should therefore grant review in this case to make clear that *Chevron*, *Bayview Homes*, and *Schor*[42] cannot be circumvented by labeling an agency determination "jurisdictional" and to reconfirm that agencies which make reasonable judgments construing

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rejected. Moreover, as previously explained, interpretation of Section 9 of the Act involves a great deal more than a simple "reading of the statutory language." Instead, it involves the construction of an ambiguous, undefined term—"reclamation development"—in light of the three important purposes underlying Congress' adoption of Section 9: (a) beneficial use of the Basin's available water; (b) shared jurisdiction between the Bureau and the Corps based on their respective areas of interest and expertise; and (c) efficient management of the Basin by the two agencies based on changing circumstances.

The Eighth Circuit also purported to distinguish *Bayview* on the ground that in that case the agency's interpretation was "*specifically brought* to Congress' attention . . . ." *Id.* (emphasis in original). But the same is true here; the Secretary's interpretation of Section 9 was in fact brought specifically to Congress' attention. Moreover, this Court has *never* indicated that deference to agency interpretation is due only where that interpretation has been presented to Congress; rather, presentation to Congress is used by this Court to confirm the reasonableness of the agency's interpretation. *See Schor*, 106 S. Ct. at 3255; *Bayview*, 106 S. Ct. at 464-65; *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 599-602 (1983).

[42] While we believe this Court had made clear long before *Schor* that deference is owed to agency constructions even in "jurisdictional" matters, *Schor* was the first case to squarely address that issue. Inasmuch as *Schor* was decided after the Eighth Circuit's decision in this case, the Court could choose to vacate and remand the case for reconsideration in light of *Schor*. Because of the importance of the issues presented, however—both as to *Chevron* as well as to the substantive federal and state water rights at stake—we submit that a summary remand is inappropriate.

their statutory mandates—including the boundaries of those mandates—are entitled to deference from the courts.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1674

THE STATE OF MISSOURI, THE STATE OF IOWA and THE STATE OF NEBRASKA,

Appellees,

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer, Omaha District, United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Division Engineer, Missouri River Division, United States Army Corps of Engineers; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Enginers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region, Bureau of Reclamation; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; GARREY E. CARUTHERS, Assistant Secretary of the Interior for Land and Water Resources; and JAMES G. WATT, Secretary of the Interior, The Department of the Interior,

Appellants.

KANSAS CITY SOUTHERN RAILWAY COMPANY, THE SIERRA CLUB, THE NEBRASKA CHAPTER OF THE FARMERS EDUCATION AND COOPERATIVE UNION OF AMERICA; THE ROCKY MOUNTAIN CHAPTER OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA; and THE IOWA CHAPTER OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA,

Appellees,

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer, Omaha District, United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Division Engineer, Missouri River Division, United States Army Corps of Engineers, Omaha, Nebraska; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Engineers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region, Bureau of Reclamation; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; MAXWELL T. L. LIFURANCE, Wyoming State Director, Bureau of Land Management; ROBERT F. BUFORD, Director Bureau of Land Management; GARREY E. CARUTHERS, Assistant Secretary of the Department of the Interior for Land and Water Resources; JAMES G. WATT, Secretary of the United States Department of the Interior; CRAIG W. RUPP, Regional Forester, Region II, (Rocky Mountain Region), United States Forest Service; R. MAX PETERSON, Chief United States Forest Service; JOHN R. BLOCK, Secretary of the United States Department of Agriculture; ANNE M. GORSUCH, Administrator, Environmental Protection Agency,

Appellants.

No. 84-1675

THE STATE OF MISSOURI, THE STATE OF IOWA and THE STATE OF NEBRASKA,

Appellees,

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer, Omaha District, United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Divi-

sion Engineer, Missouri River Division, United States Army Corps of Engineers; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Engineers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region, Bureau of Reclamation; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; GARREY E. CARUTHERS, Assistant Secretary of the Interior for Land and Water Resources; and JAMES G. WATT, Secretary of the United States Department of the Interior; Energy Transportation Systems, Inc.,

Appellants.

KANSAS CITY SOUTHERN RAILWAY COMPANY, THE SIERRA CLUB, the NEBRASKA CHAPTER OF THE EDUCATION AND COOPERATIVE UNION OF AMERICA, THE ROCKY MOUNTAIN CHAPTER OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, and THE IOWA CHAPTER OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA,

Appellees.

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer, Omaha District; United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Division Engineer, Missouri River Division, United States Army Corps of Engineers, Omaha, Nebraska; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Engineers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region, Bureau of Reclaamtion; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; MAXWELL T. L. LIFURANCE, Wyoming State Director, Bureau of Land Management; ROBERT F. BUFORD, Director, Bureau of Land Management; GARREY E. CARUTHERS, Assist-

ant Secretary of the Department of the Interior for Land and Water Resources; JAMES [G.] WATT, Secretary of the United States Department of the Interior; CRAIG W. RUPP, Regional Forester, Region II, (Rocky Mountain Region), United States Forest Service, R. MAX PETERSON, Chief, United States Forest Service; JOHN R. BLOCK, Secretary of the United States Department of Agriculture; ANNE M. GORSUCH, Administrator, Environmental Protection Agency; Energy Transportation Systems, Inc.,

Appellants.

No. 84-1719

THE STATE OF MISSOURI and THE STATE OF IOWA,
THE STATE OF NEBRASKA,

Appellant,

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer, Omaha District, United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Division Engineer, Missouri River Division, United States Army Corps of Engineers; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Engineers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region, Bureau of Reclamation; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; GARREY E. CARUTHERS, Assistant Secretary of the Interior for Land and Water Resources; and JAMES G. WATT, Secretary of the United States Department of the Interior,

Appellees,
ENERGY TRANSPORTATION SYSTEMS, INC.,

Appellee.

No. 84-1720

THE STATE OF MISSOURI and THE STATE OF NEBRASKA,
THE STATE OF IOWA,

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer; Omaha District, United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Division Engineer, Missouri River Division; United States Army Corps of Engineers; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Engineers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region[], Bureau of Reclamation; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; GARRY E. CARUTHERS, Assistant Secretary of the Interior for Land and Water Resources; and JAMES G. WATT, Secretary of the United States Department of the Interior,

Appellees,

ENERGY TRANSPORTATION SYSTEMS, INC.,
Appellee.

No. 84-1721

THE STATE OF MISSOURI,
Appellant,

THE STATE OF NEBRASKA and
THE STATE OF IOWA

v.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer, Omaha District, United States Army Corps of Engineers; BRIGADIER GENERAL MARK J. SISINYAK, Division Engineer, Missouri River Division; United States Army Corps of Engineers; LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Engineers; JOHN O. MARSH, JR., Secretary of the Army; JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region[], Bureau of Reclamation; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; GARREY E. CARUTHERS, Assistant Secretary of the Interior for Land and Water Resources; and JAMES G. WATT, Secretary of the United States Department of the Interior,

Appellees,

ENERGY TRANSPORTATION SYSTEMS, INC.,
Appellee.

Appeals from the United States District Court
for the District of Nebraska

Submitted: August 20, 1985

Filed: March 13, 1986

Before JOHN R. GIBSON and FAGG, Circuit Judges, and BRIGHT, Senior Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

On July 2, 1982 the Department of the Interior and Energy Transportation Systems, Incorporated, (ETSI)

executed an Industrial Water Service Contract authorizing ETSI to withdraw 20,000 acre-feet of water per year, for forty years, from the Oahe reservoir in South Dakota. The States of Missouri, Iowa, and Nebraska filed an action in federal district court to enjoin performance of the contract. They also sought a declaration that officers in the Department of the Interior, the Bureau of Reclamation, and the Department of the Army, had violated various federal statutes by their approval and execution of the ETSI contract. The district court [1] held that the Oahe dam and reservoir were not reclamation projects under the Flood Control Act of 1944 and, therefore, the Secretary of the Interior lacks the statutory authority to execute unilaterally a water service contract to provide water from the Oahe reservoir for industrial use. We affirm the court's judgment that the Secretary of the Interior lacked the authority to execute the ETSI contract.

Our decision makes it unnecessary that we decide many of the other issues presented by these appeals. Serious objections are raised with respect to the standing of Kansas City Southern Railway Co., the Sierra Club, and the Nebraska and Iowa Chapters of the National Farmers Union. All of these parties challenge primarily the authority of the Secretary of the Interior to unilaterally enter the ETSI contract. Since we decide this issue in the States' appeal, any further discussion would be superfluous and detailed consideration of the difficult standing issues is therefore unnecessary.

ETSI planned to transport water by pipeline from the Oahe reservoir in South Dakota to Wyoming where it would be mixed with locally-mined coal to form a coal slurry; the slurry would be transported, again by pipeline, for use in coal-fired steam-generating power plants.

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[1] The Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska.

The water service contract recites that it was executed pursuant to section 9(c) of the Flood Control Act of 1944 (the Act), Pub. L. No. 78-534, 58 Stat. 887, *reprinted in* 1944 U.S. Code Cong. Serv. 887, 891. Joint Appendix (J.A.) at 412; and section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c) (1982). The contract states that it had been reached "after consultation with the Secretary of the Army", but does not state whether the Army approved the contract. *State of Missouri v. Colonel William Andrews*, 586 F. Supp. 1268, 1272 (D. Neb. 1984).

To appreciate the substantive issues involved in this case, a discussion of the history of the Missouri River Basin development plans is required. Missouri River Basin development necessarily implicated the interests of two federal agencies: the War Department[2] which, through its subdivision, the Army Corps of Engineers, was primarily responsible for flood control and navigation throughout the country; and the Department of the Interior which, through the Bureau of Reclamation, supervised the reclamation of arid lands throughout the seventeen western states.

Prompted by flood damage and a need for a controlled water supply on the Missouri River and its tributaries, both agencies undertook studies to develop the Basin. The Corps' plan, named for Colonel Pick who prepared the report, was formalized in Congress as House of Representatives Document No. 475, 78th Cong. 2d Sess. (1944). The Bureau's report, named the Sloan plan after its author, was formalized in Congress as Senate Document No. 191, 78th Cong. 2d Sess. (1944). The district court summarized the relevant contents of both plans:

> The Corps' plan for the basin, H.R. Doc. No. 475 (the Pick Plan) proposed building five dams on the

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[2] Renamed the Department of the Army by section 205(a) of the Act, 61 Stat. 501 (1947). Referred to in this opinion as "the Army", or "Army".

> main stem of the Missouri River below Fort Peck Reservoir in Montana, including six million acre-feet reservoirs at Oahe and Oak Creek in South Dakota. The dams were to be used for flood control, navigation, irrigation, and power production, while a number of very small flood control dams were to be built on the Missouri's tributaries.
>
> The Bureau's report (the Sloan Plan) disagreed with the Pick Plan as to where the dams should be built, * * * and as to the size of Oahe Dam. The Sloan Plan proposed a 19.6 million acre-feet Oahe Reservoir which would have flooded out the Oak Creek Dam and furnished water for irrigation of 750,000 acres in South Dakota's James River Basin, navigation, and power production, as well as flood control.

State of Missouri, 586 F. Supp. at 1269 (citations omitted).

A senate committee harmonized the Pick and Sloan plans, producing the joint Pick-Sloan plan which Congress adopted in section 9(a) of the 1944 Flood Control Act. Multiple use reservoirs were an integral part of the development plan. The introduction to the Pick-Sloan plan proposed the following allocation of functions in multiple use projects:

> 3. It was possible to bring into agreement the plans of the Corps of Engineers and the Bureau of Reclamation by recognizing the following basic principles:
>
> (a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control and navigation.
>
> (b) The Bureau of Reclamation should have the responsibility for determining the reservoir capaci-

> ties on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.
>
> (c) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water.

S. Rep. No. 2471, 78th Cong. 2d Sess. (1944). This is the only place in the Pick-Sloan plan where control is discussed.

The Oahe reservoir in South Dakota was one of the main-stem reservoirs constructed pursuant to the Pick-Sloan plan. The Sloan plan's specifications for Oahe were adopted in the Pick-Sloan plan and the dam was built and operated by the Corps of Engineers.

During 1973 and 1974, the federal government began plans to develop coal and mineral deposits located in Eastern Montana and Wyoming. To expedite the use of water from the main-stem reservoirs in this process, the Army and the Department of the Interior entered a Memorandum of Understanding (MOU). Under the MOU, the Department of the Interior would determine the volume of water stored in the main-stem reservoirs which was not currently needed for irrigation. The Army would then determine the volume of that excess water available for industrial purposes. The Department of the Interior then could contract, on terms agreeable to the Army, for industrial uses of the available water. The MOU stressed cooperative action. Then Acting General Counsel to the Army, Richard Kearney, endorsed the MOU as an interim measure pending final resolution of the agencies' authority to contract for the sale of main-stem reservoir water for industrial purposes. He con-

cluded, however, that the Secretary of the Interior [3] did not have the authority to unilaterally market the water from these reservoirs for industrial purposes. *Memoranda For The Chief, Office of Civil Functions*, Dec. 16, 1974. J.A. at 170. The MOU expired December 31, 1978 and was not renewed. The ETSI contract was executed in 1982, after the MOU expired. The ETSI contract represents the first time that the Secretary of the Interior has attempted to unilaterally market water from a mainstem reservoir for industrial purposes.

To decide whether the Secretary of the Interior had authority to unilaterally execute the ETSI contract, the district court scrutinized the language and legislative history of the Act to determine how it delegated authority to the two federal agencies. The court concluded that the Secretary of the Interior lacked the authority to enter the contract and enjoined its performance.

The federal defendants and ETSI separately appeal this judgment. They argue, first, that the district court erroneously interpreted the authority delegated under the Act to the Secretary of the Interior and, second, that Congress has accepted the Secretary's interpretation of his powers under the Act. They also argue that the states do not have standing to assert these claims or, alternatively, that if the states do have standing then the matter becomes one within the exclusive jurisdiction of the United States Supreme Court.

I.

Before discussing the substantive merits of this case, we address two threshold questions. The first is whether the states of Iowa, Nebraska, and Missouri have standing to assert the claims raised in the district court. The states' complaint alleged that the planned depletion of Missouri River Basin water threatens their right to ob-

[3] Throughout this opinion we will refer to the Secretary of the Interior as such or as "the Secretary".

tain sufficient quantities of Missouri River water for such beneficial uses as production of hydro-electric power, transportation, and waste disposal. They also claimed that the planned depletion would injure fish and wildlife habitats. J.A. at 51. They further alleged that the federal appellants' conduct was the source of these threatened injuries and gave rise to causes of action under the following federal statutes: The Flood Control Act of 1944, 33 U.S.C. §§ 701-709 (1982); The National Environmental Policy Act of 1961, 42 U.S.C. §§ 4321-4395 (1982); The Fish and Wildlife Coordination Act, 16 U.S.C. § 1531 (1982); The Reclamation Project Act of 1939, 43 U.S.C. § 485(h) (1982); The Water Supply Act of 1958, 43 U.S.C. § 390b (1982); The Administrative Procedure Act, 5 U.S.C. § 706 (1982). The appellants argued that the reduction in Missouri River Basin water which the ETSI contract will cause is insignificant and will not work the injuries which the appellees allege.

The district court carefully analyzed each of the six counts in the states' complaint. It determined that, at least with respect to five of the six counts, the states had standing to assert the injuries alleged.[4] The court held that the states were members of the class of users of

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[4] Count III of the states' complaint stated that "[t]he ETSI water service contract is void because it purports to provide water for a purpose that Congress did not authorize." J.A. at 83. The district court declined to rule on standing with respect to this count because the plaintiffs had failed to specify the source of this cause of action. *State of Missouri*, Slip op. at 4. Count V of the State's complaint was based in part on the Water Supply Act, 43 U.S.C. § 390b(d). The court found that this section does not confer any rights on a specific group and therefore does not provide a private cause of action. *Slip op.* at 5. The court found, however, that review was available under the Administrative Procedure Act. *Id.*

The district court denied the states' standing to sue as parens patriae. Because we affirm the court's judgment that the states have standing to sue on their own behalf, we need not address their standing to sue as parens patriae.

Missouri River Basin water whose interests are protected by section 708 of the Flood Control Act, 33 U.S.C. § 708 (1982). *State of Missouri v. Colonel William Andrews*, No. CV 82-L-442, slip op. at 4 (D. Neb. Mar. 6, 1984). The court also found that the allegations of injury to fish, wildlife habitats, and sewage disposal stated a cause of action under the National Environmental Policy Act, 16 U.S.C. §§ 661, 1531. *State of Missouri*, slip op. at 4. Finally, the court held that the states had standing to invoke judicial review of the agencies' allegedly improper conduct under the Administrative Procedure Act, 5 U.S.C. § 701 (1982).

To establish standing to assert their claims, the states must allege that the challenged administrative conduct has, or will cause them injury in fact, economic or otherwise, and that the injured interests arguably are within the zone of interest protected by the statutes invoked. *See Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *Association of Data Processing Services Organizations v. Camp*, 397 U.S. 150, 152 (1970); *see also Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976). We conclude that the states' allegations of injury to the beneficial uses of Missouri River Basin water, and to the fish and wildlife habitats which this water supports, meet the injury-in-fact requirement. The appellants' argument that this injury is not fairly traceable to their actions, nor likely to be redressed by our decision today, is unpersuasive.[5]

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[5] The appellants also argue that the states have no standing because the alleged injuries cannot be redressed by a decision of this court. They point out that ETSI obtained its water rights from the State of South Dakota which is not a party to this action. The fact that South Dakota granted ETSI the natural flow rights does not deny the states standing to challenge the contract allowing ETSI to withdraw water from the federal reservoir. We point out that the relevant inquiry is whether a claim is *likely* to be redressed by a favorable decision. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (*citing Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 98 (1976)). The district court found

The appellants specifically challenge the district court's holding that the states are within the class of users whose interests are protected under section 6 of the Act, 43 U.S.C. § 708 (1982). They argue that section 6 is intended only to protect prior holders of water rights, granted under state law, from appropriation by the federal government.[6] We do not think that this language must be read so narrowly. Section 6 of the Act evinces an intent to protect the interests of established users of Missouri River Basin water by ensuring that the Army considers their needs when determining whether there is surplus water available for industrial use. The states are current lawful users of Missouri River Basin water. The ETSI contract threatens their established interests. As such, we hold that the injuries alleged are within the zone

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that the water service contract at issue provides that it will become void if the federal permits and approval are overturned. *Slip op.* at 3. The parties also agree that loss of the federal water service contract would effectively undermine ETSI's ability to undertake the planned coal slurry project. Brief for Federal Appellants at 20-21. The water service contract is a primary feature of the ETSI plan to use Missouri River Basin water stored in a federal reservoir as a transportation medium, and a sufficient causal connection exists between the contract and the threatened injury to the states.

Our decision in this case does not address the issue of South Dakota's right, as against other states and the federal government, to allocate waters within its borders. This issue was not presented to us and South Dakota is not a party to this case.

We are aware that the State of South Dakota has filed an original action with the United States Supreme Court which raises these issues.

[6] Section 6 provides:

> That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water * * * *

of interests protected under the Act.[7] *See, e.g., Granville House, Inc. v. Department of Health and Human Services*, 715 F.2d 1292, 1299 (8th Cir. 1983) (the prudential zone of interest test is satisfied if there is a sufficient nexus between the statutory purpose and the alleged injury.)

The second threshold question which we must decide is whether the Secretary of the Army joined in the execution of the ETSI contract. Only the Regional Director of the Bureau of Reclamation signed the contract for the government. However, it does recite that it was executed "after consultation with the Secretary of the Army." J. A. at 388. This court requested that the parties submit further information indicating whether the contract was jointly executed. In response, the federal appellants stated that "no action was taken by the Secretary of the Army under [the authority of section 6 of the Act]." *Response of Federal Appellants to Courts Sept. 24, 1985 Order* at 2.[8] The federal appellants went on to state, however,

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Pub. L. No. 78-534, 58 Stat. 887, *reprinted in* 1944 U.S. Code Cong. Serv. 887, 891 (emphasis added) *as codified at* 33 U.S.C. § 708 (1982).

[7] The appellants argue, alternatively, that if we grant the states standing to sue in this action, we must find that the suit is one between two or more states and dismiss the cause under the Eleventh amendment, for lack of jurisdiction. They contend that since South Dakota granted ETSI a water right, South Dakota's right to allocate water within its boundaries is in question. We reject this characterization of the issue before the court. The states' complaint alleges violations of federal statutes and challenges the conduct of federal agencies. As such our decision deals solely with the validity of the federal appellants' conduct.

[8] The states had maintained throughout this case that the Secretary of the Interior had acted unilaterally. In their response to the court's request, they refer to their Statement of Material Facts As To Which There Is No Dispute, and the appellants' response thereto, which contains the following:

[Footnote continued]

that the Secretary of the Army takes the position that the Secretary of the Interior acted within his authority when he executed the ETSI contract.[9] *Id.*

The federal appellants concede, therefore, that the Secretary of the Interior unilaterally executed the ETSI water service contract. That the current Secretary of the Army expressed a belief that the Secretary of the In-

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[8] [Continued]

14. The Secretary of the Army has not approved or executed a Water Service Contract with ETSI for use of water from Oahe.

Response: Plaintiff's statement in Paragraph 14 is technically correct, but the Corps did give express approval for the ETSI project to construct a water intake structure in Lake Oahe.

Response of Plaintiff-Appellees at 1. The appellees then point to the Findings of Fact entered by the Corps of Engineers' Omaha District Engineer when he issued the ETSI permit for construction of the water intake structure. The engineer stated:

> V. B. Section 6 of the Flood Control Act of 1944 (33 U.S.C. § 708) by its terms pertains only to contracts for certain uses of surplus water contained in reservoirs under the control of the Department of the Army. Issuance of the permit under consideration in these findings, * * * *would not constitute, or be tantamount to, such a contract.*

Response of Plaintiffs-Appellees to Order Dated Sept. 24, 1985, Exhibit 3 at 19 (Emphasis added). Together these statements support the conclusion that the Secretary acted unilaterally.

[9] The federal appellants specified that the Secretary of the Interior followed all the steps set out in the Memorandum of Understanding. They noted further that the memorandum did not require separate written approval by the Department of the Army of water service contracts. *Response of Federal Appellants* at 1. However, since the Memorandum of Understanding had expired when the Interior entered the ETSI contract, and since, in any case, it endorsed a *cooperative* role for both agencies, it is irrelevant to the validity of the Secretary of the Interior's unilateral action. This remains a question to be decided by examining his statutory authority.

terior had the authority to do so is irrelevant to the issue which we decide today: whether the Secretary of the Interior has the statutory authority to enter unilaterally into this contract. Having determined that the Secretary of the Army did not participate in execution of the ETSI contract, we now address this latter substantive issue.

II.

The appellants challenge the district court's holding that Oahe is not a reclamation development and that, therefore, section 9(c) of the Act cannot be invoked as authority for the Secretary's execution of the ETSI contract. They point out that section 9 of the Act incorporates the Pick-Sloan plan and, specifically, the provision in the plan which grants the Secretary of the Interior authority to regulate those functions of a project concerned primarily with irrigation. Thus, they argue, section 9 of the Act grants the Secretary jurisdiction over irrigation storage in Missouri River Basin reservoirs. They then conclude that the Reclamation Projects Act of 1939, incorporated by reference in section 9(c) of the Act, gives the Secretary the requisite industrial water marketing authority.[10]

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[10] Section 9(c) of the Reclamation Projects Act of 1939, 43 U.S.C. § 485h(c) (1982) provides:

> The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; * * * *

A.

Our analysis of this issue must begin with the language of the Act. Where the statutory language[11] is clear, it ordinarily is conclusive. *United States v. Clark*, 454 U.S. 555, 560 (1982); *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978); *Sierra Club v. Clark*, 755 F.2d 608, 615 n.9 (8th Cir. 1985). Section 9(a) of the Act provides that the comprehensive development plans set forth in Senate Document 247 (the Pick-Sloan plan) are approved by the Congress, and authorizes the Departments

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[11] The relevant portions of section 9, subsections 9(a)-(c), are set out below:

Sec. 9.

(a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The geenral comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

Pub. L. No. 78-534, 58 Stat. 887, *reprinted in* 1944 U.S. Code Cong. Serv. 887, 891.

of the Interior and the Army to begin development of these projects. Section 9(b) of the Act provides that the 1938 Missouri River Basin plan is expanded to include those projects under the Pick-Sloan plan which the Secretary of War is authorized to undertake. Section 9(c) of the Act then provides that the federal reclamation laws will govern the reclamation and power developments undertaken by the Secretary of the Interior under the Pick-Sloan plan.

A straightforward reading of section 9(a)-(c) of the Act indicates that this section does not attempt to delegate authority on the basis of storage for a particular use within a given development. The focus is on the "general comprehensive plans" proposed in the Pick-Sloan plan.[12] It envisions that each department will develop the projects which it undertakes in accordance with the applicable law and, specifically, that the reclamation laws will govern projects undertaken by the Secretary of the Interior.

The inquiry in this case then is whether Lake Oahe is a reclamation development undertaken by the Secretary of the Interior pursuant to section 9(c) of the Act. From his comprehensive findings on this question, the essential thrust of which remains unchallenged in this appeal, Judge Urbom concluded that Oahe is not a reclamation development. To the extent that his conclusion is based on findings of fact, we do not find it clearly erroneous. *Anderson v. City of Bessemer City*, 104 S. Ct. 1504, 1511 (1984). Further, we agree with the district court's interpretation of the Act which supports the conclusion that the Secretary of the Interior does not have the statutory authority which he seeks to exercise.

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[12] Some of the developments proposed in the Pick-Sloan plan included projects in Garrison, North Dakota, and Oahe, Fort Randall, Big Bend and Gavins Point, South Dakota. Some of the specifications for these projects are itemized in the Pick-Sloan plan. J.A. at 442.

The district court offered three reasons for concluding that Oahe is not a reclamation development. First, the court found that Oahe was built by the Army Corps of Engineers and is, and always has been, maintained by it. *State of Missouri*, 586 F.Supp. at 1273. The appellants concede this point. They argue, however, that Oahe is in "a very basic sense" a reclamation development, ETSI Brief at 24, because it was built, in accordance with the Sloan plan, with a substantial capacity for irrigation storage, and because a substantial portion of its construction costs would be recovered under the repayment provisions of the reclamation laws. We are satisfied, as was the district court, that the existence of irrigation capacity in Oahe is insufficient to render it a reclamation development "undertaken by the Secretary of the Interior."

Second, the court found that Oahe's dominant purpose was flood control, and that it has not been used for irrigation purposes. *Id.* at 1274. The Court noted that the Secretary of the Interior ceased construction of irrigation works to tap the reservoirs' capacity in 1982, and has never attempted to use it for irrigation. *Id.* The court also noted that there is no separate storage allocation for irrigation in the Oahe reservoir. *Id.* We think that these findings reasonably indicated that, even though Oahe has multiple use capability, there has been no significant reclamation development and hence no colorable argument that Oahe was undertaken by the Secretary of the Interior. As the district court noted, the Department of the Interior has itself, in the past, acknowledged this fact:

> Even the Department of Interior has recognized repeatedly that Oahe is controlled by the Corps. In 1957, the department's assistant solicitor said that since his department had not built the main-stem dams, it did not consider them reclamation developments and was not depositing revenues from their

> electrical production into the reclamation fund. • • • A 1974 memorandum by the department's solicitor, upon which the department relied in asserting that it unilaterally could market Oahe's water, said that "the Corps has six dams and reservoirs on the Missouri River."

State of Missouri v. Colonel William Andrews, 586 F. Supp. at 1273 (citations omitted).

Finally, the district court determined that Congress did not intent to authorize coordinate jurisdiction over the Flood Control Act projects. The court stated:

> I am persuaded that Congress did not intend to create joint and coordinate jurisdiction over each dam. The statements of congressmen, Secretary of the Interior Harold Ickes, and officials of his department show that the basin's development was to be coordinated by assigning construction, operation, and control of each dam to the agency with the dominant interest in the dam: the Corps would build flood control dams and the Bureau would build those dams intended primarily for irrigation; *the Bureau's interest in the irrigation aspects of a flood control dam would be accommodated by letting the Bureau control the irrigation distribution system, not the water or storage space in the reservoir.*

Id. at 1275 (Emphasis added). The legislative history supports the court's findings and the conclusion that each dam was undertaken and controlled by the agency with the dominant interest.[13]

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[13] In Senate discussion of the Act, Senator Overton concisely explained this development scheme:

> I endorse the statement made by the President of the United States. He undertakes to show a line of demarcation between reservoirs for reclamation and irrigation purposes and those built for flood control and navigation. One category is to be

B.

The appellants argue that the district court's focus on the words "undertaken by" reads the Pick-Sloan division of authority out of the Act, and improperly narrows the scope of the Bureau's authority. They emphasize that section 3(a)[14] of the Pick-Sloan plan accords each agency jurisdiction over main-stem reservoirs on a functional basis: The Army to determine capacities for flood control and navigation, and the Interior to determine irrigation capacity. They urge us to conclude that section 9 incorporates this functional division of authority and, thus, that the Secretary's jurisdiction turns on whether there is irrigation storage allocation in a main-stem reservoir. Under this broad interpretation the full range of the reclamation laws, including the power to enter industrial water service contracts, is available to the Secretary where there is irrigation storage in a main-stem reservoir. The salient inquiry, in their opinion, is the availability of irrigation storage.[15]

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built by the Bureau of Reclamation, and the other by the Army engineers. * * *

> The projects in this bill are along the lines suggested by the President. * * * [T]here are no projects in this bill proposed to be constructed by the Army engineers in which the interests of flood control do not predominate, and in the rivers and harbors bill there are no projects in which the interests both of flood control and navigation are not the predominating and controlling factor.

90 Cong. Rec. 8625 (1944). Senator Mahoney, also discussing this division of authority, stated "* * * [I]t was the purpose to give to the [Department of the Army] jurisditcion over [Army] dams and improvements, and to the Bureau of Reclamation jurisdiction over those which were primarily to be used for reclamation * * *." 90 Cong. Rec. 8548 (1944).

[14] *See supra* p. 10-11.

[15] While we reject appellants' arguments on other grounds, we note that they face another problem. The Oahe reservoir does not have a separate storage allocation for irrigation. Rather, there

We do not accept the argument that the district court's construction reads out of the Act the division of function set forth in the Pick-Sloan plan. The Pick-Sloan language to which the appellants refer accommodates the interest of each department in determining, in multiple use main-stem and tributary reservoirs storage capacities for flood control and irrigation. Recognition of this accommodation does not do violence to the conclusion that a project, even though it entitled multiple use developments (most did), was undertaken—that is built, operated, and maintained—by the department within whose jurisdiction its primary use fell.[16] Section 9 of the Act

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is a joint inactive storage for flood control, recreation, irrigation, municipal and industrial water, and power plants. *Water for Energy, Missouri River Reservoirs Final Environmental Impact Statement*, table 2-1 at P. 2-2. J.A. at 187.

[16] Both House and Senate discussions of the proposed Flood Control Act reflect the awareness that a given project undertaken by one department may entail some functional division of authority. Representative Curtis stated:

> The bill has a number of important features. This bill lays down the principle that all reservoirs constructed with Federal funds, which have storage space available for flood control, shall be operated under the regulations of the War Department. This is common sense. It is absolutely necessary if we are going to protect the property and the life of the people in the flooded areas. There must be a central agency operating the reservoirs. Likewise, this bill provides that whenever any reservoir is being operated by the War Department, it [sic] is found that there is available water for irrigating farm lands, that the Bureau of Reclamation, through the Secretary of the Interior, shall prescribe the rules and regulations for the operation of that part of the storage that is available for irrigation. In other words, *it gives the Bureau of Reclamation jurisdiction over the irrigation features of the reservoirs and the distribution systems.* I think this is sound and advisable. I am told by individuals in the Bureau of Reclamation that it is a definite gain for them and a step forward.

[Footnote continued]

simply adopts the projects proposed in the Pick-Sloan plan and directs that the reclamation laws apply to those undertaken by the Secretary of the Interior.

We also reject the appellant's contention that the district court impermissibly narrowed the Secretary's statutory authority by reading the statute to deny the Secretary of the Interior the authority to enter an industrial water service contract for water stored in an Army-controlled reservoir. We are convinced that other relevant provisions of the Act, as well as the legislative history of the Act, support the conclusion that the Secretary was never ceded the broad authority over irrigation stor-

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[16] [Continued]

90 Cong. Rec. 4130 (1944) (emphasis added). Senator Overton's discussion of the jurisdictional question demonstrates a similar awareness:

> The testimony shows, I think rather conclusively, that the projects herein authorized to be constructed by the Army Engineers are ones in which flood control predominates over irrigation. Of course, the Senate will understand that, insofar as irrigation is concerned, all surplus water which can be used for irrigation is turned over to the Department of the Interior, and *the method of irrigation and the operation of the irrigation works* are under the control of the Department of the Interior.

90 Cong. Rec. 8625 (1944) (emphasis added).

Our recognition that a multiple purpose project may involve functional authority for both agencies does not concede appellants' argument that Congress intended to authorize coordinate jurisdiction. To arrive at the appellants conclusion, we must focus on the use of the words "reclamation features" above all other language in the record to conclude that authority was divided on the basis of storage. We believe that the language of the Act, and the predominant indications to the contrary in the record, directs otherwise. The opinions expressed above are reflected in the statutory scheme created, which ceded to the Secretary of the Interior the authority to build irrigation works in an Army undertaken reservoir to tap its irrigation capacities. We have no basis, however, to conclude that this authority extends, as is argued here, to use of irrigation *storage* for industrial purposes.

age in Army-controlled dams for which the appellants now argue.

Section 8 supports our determination that the Act does not grant the Secretary of the Interior plenary authority over irrigation storage in Army-controlled reservoirs. Section 8 allows the Secretary of the Interior, upon the Army's determination that any Army-controlled reservoir may be used for irrigation purposes, and upon specific authorization by the Congress, to construct, operate, and maintain "such additional works in connection therewith as he may deem necessary *for irrigation purposes.*" [17] (Emphasis added.) The additional works must

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[17] Section 8 provides in full:

> Sec. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

Pub. L., No. 78-534, 58 Stat. 8887, *reprinted in* 1944 U.S. Code Cong. Serv. 887, 891.

be built, operated, and maintained pursuant to the federal reclamation laws. The thrust of this provision is to make the reclamation laws applicable to irrigation benefits made available from irrigation works constructed in Army-controlled multiple-purpose reservoirs. The salient concern is to ensure that the details of the reclamation laws—addressing such matters as cost allocation and acreage limitations—apply to contracts for irrigation benefits from reservoirs undertaken by the Army.

Section 6 of the House Flood Control Bill, the counterpart to Section 8 of the Senate Bill, used significantly different language to accommodate the interest in having the Secretary administer irrigation works, under the federal reclamation laws, in Army-controlled reservoirs. It gave the Secretary of the Interior authority to prescribe regulations "for the use of the storage available for irrigation." [18] This language arguably encompassed a broader sphere of authority for the Secretary of the Interior, one more consonant with that for which he argues today.

In the Senate hearings on the Flood Control Bill, then Secretary of the Interior Harold Ickes proposed an amendment to section 6 to clarify that the reclamation laws were intended not merely to impose regulations,

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[18] Section 6 provides:

> Hereafter, whenever in the opinion of the Secretary of War and the Chief of Engineers any dam and reservoir project operated under the direction of the Secretary can be consistently used for reclamation of arid lands, *it shall be the duty of the Secretary of the Interior to prescribe regulations under existing reclamation law for the use of the storage available for such purpose*, and the operation of any such project shall be in accordance with such regulations. Such rates, as the Secretary of the Interior may deem reasonable, shall be charged for the use of said storage; the moneys received to be deposited into the Treasury to the credit of miscellaneous receipts.

H. Rep. No. 4485 (1944) (emphasis added).

but to authorize "a system of contractual relationships." *Hearings Before the Subcommittee on Flood Control*, 78th Cong. 2d Sess. (1944). Secretary Ickes' proposed amendment was adopted as section 8 of the Act.

Secretary Ickes' amendment made two changes in the language of section 6 of the House Bill which are particularly significant to this dispute. First, it replaced the broad language dealing with regulation of "storage available for irrigation", with language authorizing the Secretary of the Interior to construct irrigation works under the provisions of the reclamation laws. Through this change the Secretary of the Interior attempted to make clear that the section governed irrigation works, including contracts for distribution of their benefits, not regulation of irrigation storage. Second, the amendment precisely states that the works authorized under section 8 of the Act are to be for irrigation purposes. By clearly emphasizing the boundaries within which the reclamation laws apply, the amendment carves out from what is otherwise an area of Army jurisdiction, a limited sphere of authority for the Secretary: the authority to administer, pursuant to the reclamation laws, irrigation works developed in Army-controlled dams.

This construction of section 8 belies the appellants' contention that section 9(c) of the Act already accorded the Secretary jurisdiction over irrigation storage in Army-controlled reservoirs. If, as appellants argue, all that is required for the reclamation laws to apply is the availability of irrigation storage, then section 8 of the Act is largely superfluous. One canon of statutory construction mandates that the provisions of a statute be construed to avoid redundancy. *Conway County Farmers Association v. United States*, 588 F.2d 592, 598 (8th Cir. 1978). Our reading of the statute avoids rendering section 8 superfluous. Section 8 clearly cannot be read as authorizing use of irrigation storage for industrial purposes and it supports our conclusion that section 9(c) di-

vides authority on a functional, not a storage allocation basis.

Secretary Ickes recognized that this limited jurisdiction did not encompass the authority to unilaterally market water for industrial purposes. In a letter to the Senate committee considering the flood control bill, Secretary Ickes attempted to broaden his authority to encompass the power to dispose of surplus water in a reservoir which, pursuant to section 8 of the Act, is utilized for irrigation purposes, for domestic or industrial purposes. He attempted to accomplish this through a proviso to section 4 of the House Bill, later enacted as section 6 of the Act,[18] and which grants the Secretary of the Army the authority to enter industrial water marketing contracts for surplus water stored in Army-controlled reservoirs. His arguments are instructive:

> A proviso should, in my opinion, be added to section 4 of the bill in order to assure that the disposition of water for domestic and industrial purposes, from reservoirs serving irrigation purposes as well, shall consistently with the irrigation provisions of section 6 of the bill, be handled pursuant to the Federal reclamation laws. While it is true that section 4 does not involve reclamation but covers merely the sale of water for domestic and industrial uses, it is true also that, in those situations where the disposition of water for irrigation purpose will be accomplished under the Federal reclamation laws, the disposition of water for domestic and industrial purposes should be accomplished under the same statutes in order to achieve efficient and economical administration. The Federal reclamation laws contain provisions specifically designated to meet this situation. I suggest therefore that the following proviso be added * * * [to] the bill: "*Provided.*

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[18] Section 6 is quoted in full *supra* at 15.

> That the Federal reclamation laws shall govern the disposition for domestic or industrial uses of surplus water *from any reservoir utilized for irrigation purposes pursuant to section 6 of this Act.*

Senate Hearings on H.R. 4485, 78th Cong. 2d Sess., *reprinted in* 90 Cong. Rec. 9277, 9279 (1944) (emphasis added.) Secretary Ickes' proposal was not adopted. If we accept the construction of the statute which the Secretary of the Interior proposes, this proviso would be read into the Act, and expanded, to allow the Department of the Interior to market surplus irrigation storage for industrial purposes even where it has not taken the steps necessary under section 8 of the Act to bring this water under its regulations.[20]

We think it is persuasive that the Secretary of the Interior at the time the Act was passed, who participated significantly in the development of the Act, did not believe that this department had the authority which the appellants today assert.

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[20] Our reading of the statute does not, as the dissent suggests, leave the irrigation storage in Oahe without an agency to administer it. Under section 8 of the Act the Secretary of the Interior may, with the requisite approval, develop irrigation works to use this storage for irrigation purposes. In this case, however, we deal with the Secretary's authority to market this water for industrial purposes. The Secretary of the Army retains the authority, pursuant to section 6 of the Act, to use any surplus water in Army-controlled reservoirs for domestic or industrial purposes.

We are aware of the Army Acting General Counsel's statement in his memoranda on Missouri River Water Marketing that the Army could not, under section 6, market the excess storage water in the main-stem reservoirs as surplus. The premise for that statement, however, was that the water not being used for irrigation, flood control, or navigation purposes was, at that time, run through generators to produce hydroelectric power. Technically, therefore, the water was being put to a lawful use and was not "surplus." *See Memorandum For The Chief, Office of Civil Functions,* Dec. 16, 1974. J.A. at 170.

The focus in section 8 on development of irrigation "works" also supports the conclusion that the Secretary of the Interior's authority in multiple use projects does not turn solely on the availability of irrigation storage. In this case, where Congress wanted to allow the Secretary jurisdiction over the irrigation developments in a reservoir undertaken by the Army, it required the Secretary to construct "additional works for irrigation purposes." [21]

Similarly, in two instances in which Congress intended to grant an agency control over water in storage, it did

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[21] The appellants argue that the district court adopted an overly restrictive definition of "works." They rely on an opinion of the Attorney General, 41 Op. Att'y Gen. 377 (1958), which held that "works" should not be read to mean only actual developments undertaken. This opinion of the Attorney General stated that section 8 of the Act makes reclamation laws applicable for the disposition of irrigation benefits even if no addiitonal works were constructed to make these benefits available. *Id.* at 395. In section 390(11) of the 1982 amendments to the Reclamation Development Laws, Congress rejected this broad reading of the "works" requirement in section 8. The amendment limits the applicability of the reclamation laws under section 8 to (1) projects which have by federal statute explicitly been designated, made a part of, or integrated into, a Federal reclamation project; and (2) projects for which the Secretary of the Interior has provided project works for the control or conveyance of agricultural water supply for the lands involved. 43 U.S.C. § 390(11) (Supp. 1984). We believe that this amendment limits applicability of reclamation laws to the disposition of irrigation benefits pursuant to the development of additional works.

Environmental Defense Fund, Inc. v. Morton, 596 F.2d 848 (9th Cir. 1979), which upheld the Secretary of the Interior's authority to enter industrial contracts for water held in reclamation development reservoirs, is likewise inapplicable to this case. The contracts executed in *Morton* fell squarely within the Secretary of the Interior's authority as set forth in section 9(c) of the Act. The projects involved were "undertaken"—built, operated and maintained—by the Secretary of Interior and, therefore, the Secretary had the authority under section 9(c) of the Reclamation Development Act to enter industrial contracts for use of this water.

so clearly. Thus, section 6 of the Act authorized the Secretary of the Army to contract for domestic and industrial uses of surplus water available in any Army-controlled reservoir.[22] This provision limits the Secretary of the Army's ability to enter industrial water contracts by specifying that the rights of existing users must be preserved. The interpretation appellants urge would lead us to imply a similar right to the Secretary of the Interior. It seems incongruous, however, to hold that, in a statutory scheme which attempts to demarcate the jurisdiction of agencies with potentially competing interests, Congress would authorize both agencies to contract for water from the same pool for industrial purposes.[23] We do not believe that the statute or its legislative history supports this conclusion.

Again, in section 7 of the Act, Congress authorized the Secretary of the Army to "prescribe regulations *for the use of storage* allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds * * *." Pub. L. No. 78-534, 58 Stat. 887, *reprinted in* 1944 U.S. Code Cong. Serv. 887, 891 (emphasis added). It is amply apparent that where Congress intended to ceed jurisdiction over water held in storage it did so clearly. Section 7 also indicates that Congress understood the distinction between projects "undertaken" by a particular department and those which merely have multiple-use capacities. Thus, section

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[22] *See supra* p. 15.

[23] In discussing section 6 of the Act, Representative W[hitt]ington noted in its favor that it gave the Secretary of the Army the industrial water marketing authority in reservoirs undertaken by the Army, which the Secretary of the Interior had in reclamation developments. 90 Cong. Rec. 4134 (1944). This attention to the careful balancing of authority in the different kinds of projects cautions against a casual decision by this court finding independent authority in both agencies to enter industrial water contracts from the same body of water.

7 grants the Army jurisdiction over all flood control storage—regardless of which agency undertook its development.[24]

Based on our review of the Act and its legislative history, we conclude that the district court correctly held that the Secretary of the Interior does not have the statutory authority to unilaterally execute the ETSI contract. The Act provides a delicate balance of authority between two departments with overlapping, and somewhat conflicting interests. The dissent's concern appears to be that the Department of the Army will not adequately represent the competing interests of upstream and downstream users. Our role in interpretation of the statute does not, however, extend to mediation of these competing interests. While a different scheme may promote more efficient or more desirable administration of the Oahe storage, it is beyond our power to determine how the respective jurisdictional boundaries ought to be drawn. On these matters we must defer to legislative prerogative. Neither the statute nor its legislative history indicates that Congress intended the Secretary of the Interior to have unilateral authority to use water stored in Army-controlled reservoirs for industrial purposes.

III.

We now address the appellants' argument that the district court erred in its refusal to defer to the Secretary of the Interior's interpretation of the scope of his statutory authority. They argue that under *Chevron U.S.A. v. Natural Resources Defense Council*, 104 S. Ct. 2778 (1984), the court should defer to the Secretary's reasonable interpretation of his power under the Act. They also mantain that the Secretary asserted this authority in Senate hearings on Missouri River Basin water marketing.

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[24] The statute does provide explicit exceptions to this broad grant of authority. *See*, Pub. L. No. 78-534, 58 Stat. 887, 890, *reprinted in* 1944 U.S. Code Cong. Serv. 887, 890.

They urge that the fact that the Senate recommended no action to change or clarify the law in response to this assertion of authority indicates Congressional acquiescence on this point.

In *Chevron* the Supreme Court stated that courts must accord considerable weight to an agency's construction of the statutory scheme which it is entrusted to administer if "this [agency's interpretation] represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Id.* at 2783 (*quoting United States v. Shimer*, 367 U.S. 374, 382 (1961)). The *Chevron* rule requires deference only where an agency reasonably construes the applicable statute on a matter which is within its jurisdiction to decide. The limits of an administrative agency's statutory authority remains an issue suitable for judicial resolution. *Harmon v. Brucker*, 355 U.S. 579, 582 (1958); *Social Security Board v. Nierotko*, 327 U.S. 358, 368 (1946). "[T]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption of major policy decisions properly made by congress. * * * [Courts] must not rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrates the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority*, 104 S. Ct. 439, 444 (1983). *See also Granville House v. Dept. of Health, Education & Welfare*, 715 F.2d 1292, 1296 (8th Cir. 1983), *rev'd.* after remand, 772 F.2d 451 (1985); *State of Nebraska v. Federal Labor Relations Authority*, 705 F.2d 945, 948 (8th Cir. 1983).

Our review of the Act and its legislative history convinces us that Congress did not intend to grant the Secretary of the Interior the authority to unilaterally contract for water stored in an Army reservoir. We therefore affirm the district court's holding that the Secretary of the Interior's assertion of this authority is beyond his

statutory mandate and therefore not entitled to judicial deference.[25]

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[25] The dissent focuses on *United States v. Bayview Homes, Inc.*, 106 S. Ct. 455 (1985), in arguing that our analysis misconstrues the appellate court's role in reviewing an agency's construction of the statute it administers. There is no conflict between the *Bayview* standard and our analysis here. A careful review of that case reveals why the deference appropriate on those facts is inappropriate in our case.

In *Bayview* the court was required to determine whether the Army Corps of Engineers' regulations interpreting "navigable waters" to include wetlands was proper under the Clean Water Act, 33 U.S.C. §§ 1251-1375. In determining that the agency's regulation deserved deference, the Court found (1) that Congress deliberately chose to define the waters covered by the Act broadly; (2) that in defining "navigable waters" to include wetlands, the Corps and the EPA employed their special technical expertise; and (3) that the scope of the Corps' jurisdiction over wetlands was *specifically brought* to Congress' attention and that Congress rejected measures to curb the Corps' jurisdiction. *Bayview*, 106 S. Ct. at 463-465.

We deal in this case with a statute delineating the respective jurisdiction of potentially competing agencies. Further, unlike the definitional issue requiring special technical expertise which the Court addressed in *Bayview*, the solicitor of the Interior Department's opinion, on which the Secretary of the Interior relies in this case, was a legal conclusion based solely on his reading of the statutory language—a function courts are capable of performing. Nor is the solicitor's interpretation of the statute as conclusively accepted as the dissent suggests. The Army Acting General Counsel's opinion to the contrary belies such a conclusion. *See supra* p. 11-12. Further, while the Department of the Army currently accedes to the validity of the ETSI contract, their response seems colored more by the fact that the Secretary of the Interior adhered to the form of the now expired MOU, than on an interpretation of Interior's statutory authority.

Finally, while the legislative history of the Act supports the conclusion that Congress intended to protect irrigation uses of Missouri River Basin Water, nowhere do we find support for the conclusion that this protection requires that the Secretary of the Interior have the power to market surplus irrigation storage in main-stem reservoirs for industrial purposes. Only a true exercise

Finally, we do not interpret Congress' failure to amend the statute in response to the MOU as constituting tacit acquiescence in the existence of the Department of the Interior's unilateral authority to enter the ETSI contract. The Supreme Court has held that a congressional committee hearing which is not contemporaneous with the passage of the statute does not conclusively establish legislative intent. *See SEC v. Sloan*, 436 U.S. 103, 120-21 (1978). In this case, while the MOU was discussed in the hearings, the basic issue under consideration was "whether the agreement between the two departments could preempt state water rights." *Hearings Before the Subcommittee on Energy Research and Water Resources on the Sale of Water from the Upper Missouri River Basin by the Federal Government for the Development of Energy*, 94th Cong. 1st Sess. 1 (1975) (opening Statement of Senator Abourezk). Senator Abourezk seriously questioned the legal authority for the marketing plan. The discussion in the record seems to target whether the legal authority rests with the states rather than the federal agencies. The Secretary of the Interior's authority in relation to the authority of the Secretary of the Army was not discussed. We think this record fails to show the degree of congressional approval necessary to override the intent of the 1944 Congress.

We affirm the district court's judgment.

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of judicial creativity would allow us to extrapolate from protection of irrigation interests to inclusion under the reclamation laws of industrial uses of main-stem surplus storage.

BRIGHT, Senior Circuit Judge, dissenting.

I dissent.

By substituting its interpretation of the Flood Control Act for that of the Secretary of the Interior, the majority misconceives our limited role when reviewing an agency's construction of a statute that it administers. As the Supreme Court has repeatedly emphasized, "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 461 (1985).[1] The Secretary of the Interior reasonably construed section 9(c) of the Flood Control Act to provide that federal reclamation law governs the administration of irrigation water stored in the Oahe Reservoir. I would therefore reverse the district court's contrary holding and decide the remaining issues presented in this appeal.

Section 9(c) of the Flood Control Act provides that "reclamation and power developments to be undertaken by the Secretary of the Interior * * * shall be governed by the Federal Reclamation Laws." The Secretary of the Interior interpreted "reclamation developments" within this provision to include irrigation water stored within multipurpose reservoirs operated by the Army Corps of Engineers on the Missouri River. The Secretary concluded that the applicable reclamation laws authorized him to market the irrigation water for industrial use.[2]

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[1] We must defer to an agency's reasonable interpretation even though it determines the agency's jurisdiction under the statute. *See United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. at 461-66 (1985).

[2] The district court did not determine and we do not decide whether the Secretary correctly construed his powers under the reclamation laws. We consider only whether the Secretary reasonably concluded that the reclamation laws govern the administration of the stored irrigation water.

Pursuant to section 9(c) and the reclamation laws, the Secretary executed contracts to supply ETSI with irrigation water held within the Oahe Reservoir, a multipurpose reservoir on the Missouri River operated by the Corps.

The thoroughness and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given the agency's interpretation. *See Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). The Secretary's interpretation of section 9(c) was first asserted by the Solicitor of the Interior Department in a 1974 opinion. In 1975, the Secretary of the Interior formally adopted the interpretation in a Memorandum of Understanding entered into with the Secretary of the Army. The Memorandum stated that the Secretary of the Interior could market excess irrigation water stored in the Army-controlled reservoirs on the main stem of the Missouri River. The parties informed a congressional subcommittee that the Secretary of the Interior gained such authority from the reclamation laws, which they contended applied to the stored irrigation water under section 9(c) of the Flood Control Act. *Hearings on the Sale of Water from the Upper Missouri River Basin by the Federal Government for the Development of Energy*, 94th Cong., 1st Sess[.] 1, 5 (1975). The Memorandum expired in 1978.[3]

Since 1975, therefore, the Secretary of the Interior has consistently interpreted "reclamation developments"

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[3] The majority states that the Memorandum of Understanding has no relevancy in this action because it had expired when the Secretary executed the ETSI contract. *See* Majority Opinion at 17 n.9. However, the Memorandum does show that the Secretary of the Interior has consistently interpreted section 9(c) of the Flood Control Act to require application of reclamation laws to irrigation water stored in the Army-controlled main stem reservoirs. To that extent, therefore, the Memorandum of Understanding has great relevance to our examination of the Secretary's authority to enter the ETSI contract.

within section 9(c) to include irrigation water stored in multipurpose reservoirs on the Missouri River. We must give great weight to this long-standing and thoroughly reasoned construction. Consequently, we review the Secretary's interpretation only to determine whether it reflects a reasonable construction of section 9(c) in light of the language, policies, and history of the Flood Control Act of 1944. *Riverside Bayview Homes*, 106 S.Ct. at 461-62.

The Secretary's interpretation certainly represents a permissible construction of the language of the Flood Control Act. The Act nowhere defines "reclamation developments" as used in section 9(c). Further, it does not explicitly delegate control over stored irrigation and reclamation water to either the Army or the Interior. Indeed, the Act never specifically mentions such water. The Act therefore fails to reveal any clear and unambiguous intention of Congress to exclude irrigation water from the meaning of "reclamation * * * developments to be undertaken by the Secretary of the Interior" in section 9(c).

Despite an inability to identify the precise meaning that Congress attached to "reclamation developments," the majority asserts that several provisions of the Act reflect Congress' definite intent to foreclose the Secretary's interpretation. These provisions, however, also can be read consistently with section 9(c) as construed by the Secretary. Language open to such varying interpretations cannot be said to reveal Congress' "clear and unambiguous" intent, as the majority contends.[4]

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[4] The majority, for example, finds great significance in Congress' specific delegation to the Army of control over water stored for flood control and navigation (section 7) and over surplus water not allocated for any use (section 6). *See* Majority Opinion at 32-33. The majority concludes that Congress would have also specifically granted the Secretary of the Interior jurisdiction over

Not only the words but also the legislative history of the Act fall far short of showing any unambiguous congressional intent to bar the Secretary of the Interior from asserting jurisdiction over irrigation water stored in Army reservoirs. *See Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 105 S.Ct. 1102, 1110 (1985) ("After examining the wording and legislative history of the statute, we agree with [the agencies] that the legislative history itself does not evince an unambiguous Congressional intention to forbid [the agencies' interpretation]."). Indeed, the evolution of the Flood Control Act strongly supports the interpretation of section 9(c) advanced by the Secretary of the Interior.

In the early forties, Congress requested the Army Corps of Engineers and the Interior's Bureau of Reclamation to develop plans for alleviating water problems facing the states in the Missouri River Basin. The Corps' study, the Pick Plan, focused primarily on reducing the flooding problems of the downstream states without depriving them of the Missouri's navigation benefits. *See* H.R. Doc. 475, 78th Cong., 2d Sess. (1944). In contrast, the Bureau of Reclamation's study, the Sloan Plan, directed most of its attention to guaranteeing a ready supply of irrigation water for the frequently drought-stricken

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stored irrigation water had it intended the Secretary to exercise such control.

If we followed the majority's reasoning to its logical conclusion, no agency has jurisdiction over irrigation water stored in Army reservoirs because Congress did not expressly delegate such authority. Such a rigid and narrow reading of the Act finds little support in the Act's language and no support in its legislative history. An equally reasonable explanation for the lack of any specific delegation of jurisdiction to the Secretary of the Interior is that Congress believed that such jurisdiction was already sufficiently delegated in section 9(c). This explanation not only gives the Act internal symmetry and consistency, but also supports the interpretation of section 9(c) advanced by the Secretary of the Interior.

states in the upper Missouri Basin. *See* S. Doc. 191, 78th Cong. 2d Sess. (1944).

Both plans ultimately advised Congress to authorize construction of a series of dams and reservoirs along the Missouri River and its tributaries. Because the Corps and the Bureau of Reclamation represented different interests, their plans differed in matters such as the placement and size of the projects. Both agencies agreed, however, that the reservoirs should be administered such to "contribute most significantly to the welfare and livelihood of the largest number of people." H.R. Doc. 475 at 7; *see* S. Doc. 191 at 10.

The agencies suggested that, to achieve the greatest benefits, the reservoirs should serve a number of purposes, including flood control, navigation, and irrigation. H.R. Doc. 475 at 7; S. Doc. 191 at 10. And to assure that both the upstream and downstream states would share in the reservoirs' benefits, the agencies proposed that the Secretaries of the Army and Interior share in the reservoirs' control.

Under this concept of coordinate jurisdiction, the agency with the dominant interest in the reservoir would control its daily operations. For example, the Army Corps would operate those reservoirs intended primarily for flood control and navigation. To the extent that the Secretary of the Interior also had an interest in the reservoirs, the regulations of the Secretary would govern the administration of that interest. Therefore, the Secretary's regulations would control the administration of irrigation water stored in all multipurpose reservoirs.[5]

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[5] The Chief of Engineers summarized the mechanics of this shared jurisdiction in a letter accompanying the submission of the Pick Plan to Congress:

> Tributory reservoirs should, when advisable from the standpoint of basin-wide development, be constructed, operated, and maintained by the agency with the dominant interest under

Because the Pick and Sloan Plans differed in some respects, Congress directed that a committee representing both agencies prepare a report reconciling the differences. In the resulting "Pick-Sloan Compromise," the only provision discussing control of the reservoirs reiterated the need for shared jurisdiction between the agencies:

> 3. It was possible to bring into agreement the plans of the Corps of Engineers and the Bureau of Reclamation by recognizing the following basic principles:

> existing law. It is essential, however, that the main stem projects be built, operated, and maintained by the Corps of Engineers, and that utilization of storage reserved for flood control in all multiple-purpose reservoirs or tribut[a]ries be in accordance with regulations prescribed by the Secretary of War. * * * Conversely, utilization of storage reserved for irrigation in all multiple-purpose reservoirs should be in accordance with regulations prescribed by the Secretary of the Interior.

H.R. Doc. 475 at 3-4.

> The Sloan Plan echoed this division of authority:
>
> All reservoirs where flood control and navigation are dominant should be operated by the Corps of Engineers, and where flood control and navigation functions are minor, the reservoir should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. All irrigation features should be operated by the Bureau of Reclamation or its agents. All reservoirs in which irrigation, restoration of surface and ground waters, or powers, is dominant, should be operated by the Bureau of Reclamation. Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned.

S. Doc. 191 at 11. In a letter commenting on the Sloan Plan and accompanying its filing with Congress, the Army Corps again emphasized that "[i]n all reservoirs, utilization of storage for flood control should be in accordance with regulations prescribed by the Secretary of War and utilization of storage for irrigation should be in accordance with regulations prescribed by the Secretary of the Interior." *Id.* at 8.

> (a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tribut[a]ry reservoirs for flood control and navigation.
>
> (b) The Bureau of Reclamation should have the responsibility for determining reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.

S. Doc. 247, 78th Cong., 2d Sess. 1 (1944)

The Pick, Sloan, and Pick-Sloan Plans thus assumed that Interior regulations would govern irrigation water stored in multipurpose dams, and Army regulations would control water stored for flood control and navigation. Congress adopted the Pick and Sloan Plans, as reconciled in the Pick-Sloan Compromise, in section 9(a) of the Flood Control Act. Neither the Act nor its legislative history clearly rejects the plans' underlying assumption of coordinate jurisdiction. The Secretary could therefore reasonably conclude that "reclamation developments" within section 9(c) include irrigation water stored in the main stem reservoirs.[6]

As the Supreme Court recently observed, effectuating congressional intent will occasionally yield anomalies. *Federal Reserve System v. Dimension Financial Corp.*, 106 S. Ct. 681, 689 n.7 (1986). Although nothing prohibits Congress from adopting unwise legislation, *id.*, we must not assume that Congress did so unless compelled by

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[6] The majority contends that Congress' failure to adopt two proposed provisions that specifically provided that reclamation law applied to irrigation water strongly suggests that Congress did not intend for such law to apply. Once again, however, Congress' failure to pass the legislation can be also construed consistently with the Secretary's position, and therefore hardly constitutes compelling evidence of its intent.

a clear expression of congressional intent. The majority's interpretation of the Flood Control Act produces some very curious results. It leaves the irrigation water stored in the main stem reservoirs without a governing agency or law. *See supra* at 39 n.4. Consequently, the irrigation water stored in the vast Oahe Reservoir will sit unused and useless.[7] The Department of the Interior, representative of the irrigation interests of the upper basin states, will have no voice in the administration of the excess irrigation water. Instead, the Army Corps of Engineers, whose primary interests are in flood control and navigation, the same primary interests as the downstream states, will unilaterally regulate water in the largest federal reservoir in the Missouri Basin—a reservoir located in an upstream state and designed with the anticipation that its major consumptive use would be irrigation. Surely Congress did not intend such incongruous consequences.

In the absence of a congressional directive to the contrary, we must defer to the Secretary's reasonable interpretation of section 9(c) of the Flood Control Act. *See Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 105 S.Ct. at 1112. This deference seems particularily apt here, where the Army Corps of Engineers asserts no objection to the actions taken by the Secretary of the Interior. We should uphold the Secre-

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[7] An essential difference between the majority and the dissent centers on whether water allocated for irrigation, but not yet used for that purpose, becomes "surplus water" under the Army's control pursuant to section 6 of the Flood Control Act. Although the majority contends that the stored irrigation water constitutes "surplus water," Majority Opinion at 30 n.20, the legislative history of section 6 indicates otherwise. The debates on section 6 indicate that Congress may have intended "surplus water" to include only water not allocated for other uses. *See, e.g.*, 90 Cong. Rec. 4133. The water here in question from the Oahe Reservoir is allocated for irrigation, and therefore apparently does not constitute "surplus water" under the Army's control.

tary's permissible construction, not indulge in judicial creativity by choosing between competing interpretations. I would therefore reverse the district court's ruling that reclamation law does not apply to the irrigation water stored in the Oahe Reservoir,[8] and address those remaining issues not decided by the majority because of its disposition of this appeal.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[8] The majority observes that an "additional problem" exists because no specific allocation has been made concerning the amount of irrigation water stored in the Oahe. Majority Opinion at 24 n.15. The design of the reservoir as authorized by Congress, however, expressly stated that the Oahe Reservoir would contain water to irrigate 750,000 acres of land, as well as additional storage for flood control and other uses. *See* S. Doc. 247, 78th Cong., 2d Sess. 3 (1944) ("The Pick-Sloan Compromise") (codified at section 9(a) of the Flood Control Act of 1944). No party to this appeal contends that the 20,000 acre-feet of water per year included in the ETSI contract would even approach exhausting this allocation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV82-L-442

STATE OF MISSOURI, *et al.*,
Plaintiffs,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Defendants.

CV82-L-443

KANSAS CITY SOUTHERN RAILWAY CO., *et al.*,
Plaintiffs,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Defendants.

MEMORANDUM ON MOTIONS TO DISMISS
AND ON CROSS-MOTIONS FOR PARTIAL
SUMMARY JUDGMENT

[Filed May 3, 1984]

This memorandum concerns the issue of the authority of the Secretary of the Interior to sign a contract with

Energy Transportation Systems, Inc. (ETSI) which would allow ETSI to use water from Oahe Reservoir in a coal slurry pipeline. The complaints in both of these cases allege that the Secretary lacked authority to enter into the contract. The defendants have moved to dismiss these claims, and cross-motions for partial summary judgment also have been filed. Filings 57, 73, 93 and 143 in CV82-L-442 and filings 67, 70, 104 and 147 in CV82-L-443. The State of South Dakota, proceeding as amicus curiae, argues that the issue is irrelevant.

I. General History

The authority of the Secretary of the Interior depends on an interpretation of the Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887, the single most important subject of which was the Missouri River Basin. The lower basin suffered severe floods in 1942, 1943 and 1944. Flood Control: Hearings on H.R. 4485 before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess. (1944), at 659-663 (testimony of Col. Miles Reber) (hereinafter cited as 1944 Hearings); H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944), at 24-25. Residents of the lower basin pressured Congress for flood control, and residents of the upper basin wanted reservoirs for storage of water for irrigation.

The basin's development concerned two agencies—the War Department's Corps of Engineers [1], which was responsible for flood control and navigation throughout the country, and the Bureau of Reclamation of the Department of the Interior, which was organized to reclaim the arid lands of the nation's seventeen western states. These different responsibilities produced some conflict between the two agencies over where the dams would be built, who would build them, how the resulting reservoirs

[1] In 1947, the Department of War became the Department of the Army. P.L. 80-253, § 205(a), 61 Stat. 495, 501. I shall use the two designations interchangeably.

would be used, and who would control them. The Corps wanted as much empty storage space as possible to hold back flood waters and to use stored water during droughts to maintain the Missouri below Sioux City at a level high enough for navigation and sewage disposal. The Bureau wanted as much full storage space as possible for irrigation, especially during long droughts.

The Corps' plan for the basin, H.R. Doc. No. 475 (the Pick Plan) proposed building five dams on the main stem of the Missouri River below Fort Peck Reservoir in Montana, including six million acre-feet reservoirs at Oahe and Oak Creek in South Dakota. The dams were to be used for flood control, navigation, irrigation, and power production, while a number of very small flood control dams were to be built on the Missouri's tributaries. *Id.*, at 28, 29.

The Bureau's report (the Sloan Plan) disagreed with the Pick Plan as to where the dams should be built, 1944 Hearings, at 516-518 (testimony of W. G. Sloan); Sen. Doc. No. 191, at 115-118, and as to the size of Oahe Dam. The Sloan Plan proposed a 19.6 million acre-feet Oahe Reservoir which would have flooded out the Oak Creek Dam and furnished water for irrigation of 750,000 acres in South Dakota's James River Basin, navigation, and power production, as well as flood control. Sen. Doc. No. 191, at 115.

Although the parties disagree on the seriousness of the conflict between the Corps and the Bureau, it is impossible and unnecessary to characterize accurately the agencies' relationship. No matter how bitter the dispute may have been, the agencies never disagreed over who was to build and control the main stem dams. The Pick Plan assigned those duties to the Corps of Engineers. H.R. Doc. No. 475, at 31. Maj. Gen. Reybold, the Chief of Engineers, told Bureau Commissioner H. W. Bashore that Corps' control of those dams was essential. Sen. Doc. No. 191, at 7. Bashore's formal commentary on the

Pick Plan said that the main stem dams should be "constructed, operated, and maintained by the Corps of Engineers" because of "their peculiarly close relationship with flood control and navigation." H.R. Doc. No. 475, at 7; see, also, Letter of H. W. Bashore to the Secretary of the Interior, reprinted in Sen. Doc. No. 191, at 4. The Bureau's Board of Review recommended that the Corps operate all reservoirs where flood control and navigation dominated; it also recommended that the Bureau operate all "irrigation features" and that where a reservoir's irrigation function was minor compared with flood control, it should be operated "under regulations of the Bureau" as far as irrigation was concerned. Sen. Doc. No. 191, at 11.

During Senate committee hearings on the Flood Control Act, representatives of the Corps and the Bureau met to reconcile their differences. The resulting document was called the Pick-Sloan Plan, Sen. Doc. No. 247, 78th Cong., 2d Sess. (1944). Two parts of the plan are relevant here. First, it recommended the high Oahe dam proposed by the Bureau. *Id.* at 3. The Corps had proposed low dams at Oahe and Oak Creek because it did not believe the ground at Oahe could provide a strong enough foundation for a high dam. When the Bureau's surveys reached the opposite conclusion, the Corps endorsed the high dam and said the extra storage should be used for irrigation, flood control, and navigation. 1944 Hearings, at 508, 518 (testimony of Col. Reber); at 518 (testimony of W. G. Sloan); at 594 (testimony of Rep. Case). The plan said that the high dam would supply water for irrigation in the James River Basin, flood control, navigation, and power production. Second, the Pick-Sloan Plan's only discussion regarding control was the following:

> "3. It was possible to bring into agreement the plans of the Corps of Engineers and the Bureau of Reclamation by recognizing the following basic principles:

(a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control.

(b) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.

(c) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water."

Sen. Doc. No. 247, at 1

Ultimately, in § 9(a) of the Flood Control Act, Congress adopted the Pick and Sloans Plans "as revised and coordinated" by Sen. Doc. No. 247 and authorized construction by the Departments of War and the Interior. P.L. 78-534, § 9(a), 58 Stat. 887, 891. Section 9(b) of the Act expanded earlier flood control acts to include those works authorized in § 9(a) which were to be built by the War Department. Section 9(c) said that the developments to be undertaken by the Interior Department were to be governed by the federal reclamation laws. Although § 9 concerned only the Missouri River Basin, § 10 authorized construction projects throughout the country, which were to be built by the Corps. Sections 4 through 8 allocated control of all the projects authorized in the Act. Section 4 permitted the Secretary of War to build and operate recreation facilities at reservoirs under his control; § 5 said that electricity generated at projects controlled by the War Department was to be turned over to the Interior Department for sale to the public; § 6 authorized the War Department to furnish water from Corps reservoirs for domestic and industrial use; § 7 required the War Department to prescribe regu-

lations for the use of storage allocated at all federal dams for flood control and navigation; § 8 said that if the War Department determined that a dam it operated could be used for irrigation, the Secretary of the Interior was to build and control the works needed to distribute that water, under the provisions of the reclamation laws.

Pursuant to §§ 9(a) and 9(b), the Corps finished construction of the Oahe Dam in 1962. 128 Cong. Rec. S8479 (daily ed. July 16, 1982) Table II. The Corps always has operated and maintained all of the main stem dams and reservoirs on the Missouri. Letter of Col. C. A. Selleck, Jr. to E. R. Wilde, October 4, 1978, filing 337 in CV82-L-442, Administrative Record Document No. 900399; 1975 Memorandum of Understanding between the Secretary of the Interior and the Secretary of the Army, February 24, 1975, Admin. Rec. Doc. No. 900072, reprinted in Missouri River Basin Industrial Water Marketing: Hearings before Senate Committee on Interior and Industrial Affairs, 94th Cong., 1st Sess. (1975), Part 1, at 10-11 (hereinafter cited as 1975 Hearings). The Interior Department did not begin construction of the Oahe irrigation works described in the Sloan Plan until after 1968 and construction later was halted.

In response to the energy crisis of 1973 and 1974, the federal government began plans to develop the large deposits of coal, oil, and gas in eastern Montana and Wyoming. 128 Cong. Rec. S8482 (daily ed. July 16, 1982) (statement of Sen. Wallop). The government thought that the main stem reservoirs could supply the water needed for this development. Report of the Ad Hoc Committee on Water Marketing, July 1, 1974, Admin. Rec. Doc. No. 900336, at 5. The Bureau and the Corps agreed that one million acre-feet of water could be made available each year for industrial use from the main stem reservoirs. 1975 Hearings, at 6. On February 24, 1975, the Secretary of the Army and the Secretary of the Interior signed a "Memorandum of Understanding" de-

signed to expedite the use of water for energy development in the Missouri River Basin. Admin. Rec. Doc. No. 900072; 1975 Hearings, at 10-11. The memorandum said that the Interior Department would determine the amount of water available from the main stem reservoirs for irrigation and the extent to which that water would not be needed for irrigation; the Army then would determine how much of that excess water could be made available for industrial uses. Admin. Rec. Doc. No. 900072, at 1. The Secretary of the Interior was authorized then to contract for that water, on terms acceptable to it and the Army. *Id.* The memorandum was to last two years, *id.* at 2, but because of an extension, it did not expire until December 31, 1978. Letter from the Commissioner of the Bureau of Reclamation to the Assistant Secretary for Land and Water Resources, November 5, 1980, Admin. Rec. Doc. No. 900241, at 1. The Corps, in refusing to agree to another extension, pointed out that industrial water no longer was needed urgently and that the Interior Department had not executed a single contract for water delivery under the memorandum. Letter of Col. Selleck to E. R. Wilde, October 4, 1978, supra. However, the Interior Department later announced that it intended to contract unilaterally for service of up to one million acre-feet of water for industrial uses from the main stem dams. Admin. Rec. Doc. No. 900241, at 1.

ETSI had expressed interest in water from Oahe long before the memorandum of understanding had expired. On December 5, 1973, ETSI asked the Corps for permission to remove 75,000 acre-feet of water annually from Oahe for use in a coal slurry pipeline, 1975 Hearings, at 10, and on December 18, 1974, ETSI made a similar request to the Bureau, 1975 Hearings, at 9. On July 2, 1982, the Secretary of the Interior and ETSI executed an "Industrial Water Service Contract." Admin. Rec. Doc. No. 900331. The contract said ETSI had received a conditional water permit from the South Dakota Conservancy District for an annual diversion of 50,000 acre-feet

from Oahe Reservoir and that ETSI now sought the Interior Department's approval for diverting 20,000 of the acre-feet awarded by the conditional permit. Although the contract said that this decision had been reached "after consultation with the Secretary of the Army," it did not say whether the Army favored or opposed the contract. The contract was to last forty years and said that the water was to be used in a coal slurry pipeline. At the time the contract was signed, neither the Army nor the Interior Department had executed any contracts for the use of water from the main stem reservoirs for irrigation purposes. 128 Cong. Rec. S8477 (daily ed. July 16, 1982) Table I, n. 3.

The issue now before me is whether the Secretary of the Interior had the authority to execute the ETSI contract. But before I address that issue I must consider South Dakota's amicus curiae briefs, which contend that the federal government cannot "sell" water but can only "contract for" water. Representatives of western states have resisted the former term, because they believe it implies that the United States owns the water. 90 Cong. Rec. 8231 (statement of Sen. Millikin), 128 Cong. Rec. S8482 (daily ed. July 16, 1982) (statement of Sen. Wallop); but see 90 Cong. Rec. 8231 (statements of Reps. Overton and White). Solely to avoid needless controversy, I shall avoid the term "sell." The existence of such a propriety interest is not in question here. South Dakota's assertion that it owns and absolutely controls the water in Oahe Reservoir ignores the federal government's interest in exercising some control over water, see *California v United States*, 438 U.S. 645, 668, n. 21, 679 (1978), the relation to navigable streams to interstate commerce, the federal government's sizable investment in the construction and operation of Oahe Reservoir, and the Flood Control Act's express grants of authority to federal agencies in regard to dams built by the federal government. Because the United States has an interest in controlling Oahe Reservoir, South Dakota cannot successfully argue

that the issue of which federal officials may exercise that control is irrelevant.

II. Substantive Merits

A.

The plaintiffs argue that nothing in the Flood Control Act permitted the Secretary of the Interior to sign the contract with ETSI. The defendants contend that § 9(c) of the Flood Control Act, coupled with § 9(c) of the Reclamation Project Act, P.L. 76-260, 53 Stat. 1187, 1194 (1939), authorized the Secretary's action. The contract itself says that it was authorized by those two sections. Admin. Rec. Doc. No. 900331, at 1. Section 9(c) of the Reclamation Project Act allows the Secretary of the Interior to enter contracts to furnish water for municipal or miscellaneous purposes [2], subject to certain repayment requirements. The Flood Control Act, after adopting the Pick, Sloan, and Pick-Sloan plans in § 9(a), says in § 9(c) that "the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws," including the Reclamation Project Act of 1939. The defendants argue that § 9(c) of the Flood Control Act incorporates the Reclamation Project Act's provision which allows the Interior Department to furnish water for miscellaneous purposes from dams built under the Flood Control Act.

At least two courts have accepted this incorporation theory in regard to dams built by the Bureau of Reclamation. In *Environmental Defense Fund, Inc. v Morton*, 420 F. Supp. 1037, 1040-1043 (U.S.D.C. Mont. 1976), the court allowed the Bureau to furnish water for industrial purposes from the Yellowtail and Boysen Reservoirs,

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[2] The parties disagree on whether a coal slurry pipeline is a miscellaneous use as contemplated by the Reclamation Project Act. My disposition of the authority issue makes resolution of this secondary question unnecessary.

which the Bureau had built as reclamation developments under the Flood Control Act. The court's opinion said that "miscellaneous purposes" included industrial use, and pointed out that the department had told Congress that it was selling water from its Flood Control Act dams for such purposes and Congress had not halted the practice. The district court's ruling on this issue was affirmed on appeal, although other parts of the decision were reversed. *Environmental Defense Fund, Inc. v Andrus*, 596 F.2d 848, 850 (C.A. 9th Cir. 1979).

This holding, however, concerned only dams built by the Bureau of Reclamation. Although the defendants contend that the holding also applied to the Missouri River's main stem dams, the appellate court's statement of the controverted issues referred only to the Yellowtail and Boysen Reservoirs. *Id.*, at 850. The district court's opinion discussed only those two projects, which are in the Yellowstone Basin, and projects built in the Upper Missouri River Basin. 420 F. Supp. at 1041-1042. Neither basin contains the main stem dams built by the Corps. See Sen. Doc. No. 191, at 49-50, 53, 54-55. Furthermore, even an intentional reference to the main stem dams would have been dictum. As far as I know, no court has ever considered whether the Flood Control Act and the Reclamation Project Act should be read together to allow the Interior Department to furnish water for industrial purposes from a main stem reservoir such as Oahe.

B.

Three factors persuade me that Oahe Dam was not a reclamation or power development to be undertaken by the Secretary of the Interior pursuant to § 9(c) of the Flood Control Act but was built under § 9(b), which concerned projects to be built by the Corps.

First, Oahe Dam was built by the Corps, and the dam and reservoir always have been operated and maintained by the Corps. In 1944, the Corps and the Bureau agreed

that the Corps was to build, operate, and maintain Oahe because of its importance to flood control and navigation. H.R. Doc. No. 475, at 7; Sen. Doc. No. 191, at 4, 7. Proponents of the Flood Control Act said the Corps should build and control those dams in the basin which were primarily for flood control and navigation, 90 Cong. Rec. 8315, 8625 (statements of Sen. Overton), 9282 (statement of Rep. Whittington). There is no dispute that the Corps built Oahe.

Even the Department of Interior has recognized repeatedly that Oahe is controlled by the Corps. In 1957, the department's assistant solicitor said that since his department had not built the main stem dams, it did not consider them reclamation developments and was not depositing revenues from their electrical production into the reclamation fund. Missouri Basin Water Problems: Joint Hearings before the Senate Committee on Interior and Insular Affairs and the Senate Committee on Public Works, 85th Cong. 1st Sess. (1957), Part 2, at 318, 319 (hereinafter cited as 1957 Hearings) (testimony of Edward Weinberg). A 1974 memorandum by the department's solicitor, upon which the department relied in asserting that it unilaterally could market Oahe's water, said that "the Corps has six dams and reservoirs on the Missouri River." Letter of the Solicitor to the Secretary of the Interior, November 27, 1974, at 2, Admin. Rec. Doc. No. 900065. The 1975 Memorandum of Understanding, signed by the Secretary of the Interior, says that the Army was to "retain all operational and managerial control" over the main stem reservoirs, Admin. Rec. Doc. No. 900072, at 1, and even the ETSI contract says that the Corps "constructed and is operating" Oahe. Admin. Rec. Doc. No. 900331, at 1. Except for the fact that the Bureau investigated the feasibility of erecting a high dam at Oahe by conducting surveys and exploratory drillings, see 1944 Hearings, at 508 (testimony of Col. Reber), and 517-518 (testimony of W. G. Sloan), the defendants have not pointed to any evidence that the In-

terior Department has assisted in the construction, operation, or maintenance of the Oahe Dam and Reservoir. All the evidence before me is that Oahe was undertaken by the Army, not by the Interior Department, and therefore is not covered by § 9(c).

The second factor is that Oahe's dominant purpose was flood control, and it has not been used for irrigation. The Sloan Plan said that Oahe should be used to irrigate 750,000 acres of land in the James River Basin of eastern South Dakota. Sen. Doc. No. 191, at 115-116. The Sloan Plan did not say who would build the necessary irrigation works or when they would be built. The Pick-Sloan [P]lan said merely that Oahe was to "be developed in accordance with" the Sloan Plan. Sen. Doc. No. 247, at 6. The Corps finished the main dam in 1962, as I have said, but the Interior Department did not begin work on the irrigation works until sometime between 1968 and 1975. See Act of August 3, 1968, P.L. 90-453, 82 Stat. 624, 625; 1975 Hearings, at 9. Congress later authorized the Interior Department to cancel construction, WEB Rural Water Development Project Act of 1982, P.L. 97-273, § 3(a)(1) and § 4, 96 Stat. 1181, 1182, and South Dakota opposes any further construction, S.D. Cod. Laws Ann. § 46A-1-78 (1983). As of 1982, there were no contracts in effect for water diversions from the main stem dams by any private irrigators, 128 Cong. Rec. S8477 (daily ed. July 16, 1982), Table I, n. 3, and there is no evidence that any Oahe water ever has been used for irrigation or will be in the near future. Indeed, only two years ago, when Senator Patrick Moynihan asked Congress to declare that the federal reclamation laws applied to all the reservoirs which the Corps had built, he exempted all of the main stem Missouri projects—including Oahe—from the scope of his unsuccessful proposal. 128 Cong. Rec. S8475 (daily ed. July 16, 1982). From the evidence before me, I find no basis for my considering Oahe to be a reclamation development.

The defendants contend that there are several reasons to consider Oahe as a reclamation development. ETSI argues, first, that only a small part of the Oahe Reservoir is needed for flood control and navigation and a much larger part was allocated for irrigation. To support this ETSI cites Col. Reber's testimony that only twenty million of the sixty million acre-feet of storage in the main stem reservoirs is needed for flood control. But ETSI fails to provide any statistics which show that a majority of storage at Oahe—instead of the main stem reservoirs as a whole—is devoted to irrigation, and I do not know that any such statistics exist. The 1976 storage allocation for Oahe said that 5.5 million acre-feet was in "Inactive" storage, 1.1 million acre-feet exclusively for flood control, 3.2 million acre-feet for "Annual Flood Space and Multiple Use," and 13.7 million acre-feet for "Carryover Multiple Use." "Water for Energy: Missouri River Reservoirs Final Environmental Impact Statement," filing 202 in CV82-L-442, Exhibit 1, at 2-2, Table 2-1. The table lumps navigation, power, and irrigation storage together. Furthermore, Congress and the Bureau of Reclamation considered flood control and navigation to be Oahe's dominant purposes, regardless of how much storage space those uses require. See 1944 Hearings, at 611 (statement of Sen. Overton); 90 Cong. Rec. 8625 (statement of Sen. Overton) (Corps to build only flood dams whose primary purpose is flood control); H.R. Doc. No. 475, at 7 (letter of H. W. Bashore). See, also, 1944 Hearings, at 671 (statement of Col. Reber) (amount of storage needed for a particular use does not establish the priority of that use). And, even if Oahe was an irrigation development, it was not undertaken by the Interior Department.

ETSI also argues that most of the costs and benefits of developing the basin were attributable to irrigation. But ETSI's statistics are for the entire basin, so they include the many irrigation dams built on the Missouri River's tributaries. Actually, only 18.1 per cent of Oahe's

cost was allocated to irrigation. 128 Cong. Rec. S8479 (daily ed. July 16, 1982) Table II.

The defendants also contend that Oahe is a reclamation development undertaken by the Interior Department because the Pick-Sloan Plan and the Flood Control Act gave the Bureau and the Corps joint and coordinate jurisdiction over the main stem dams, with control allocated by function, pointing out that the Act's legislative history repeatedly says that the Interior Department is to regulate irrigation storage in reservoirs built by the Corps. They also observe that the Pick-Sloan Plan's sole discussion of control says that the Bureau should determine the main stem reservoirs' capacity for irrigation. Sen. Doc. No. 247, at 1. Col. Reber's testimony indicates that if the Corps were to be allocated a specific amount of storage space for its purposes, while the Bureau were to receive specific space for irrigation, the two agencies could operate independently, 1944 Hearings, at 729, but he also said that divided control of a reservoir would be impractical. Rivers and Harbors Omnibus Bill: Hearings before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess. (1944), Part 1, at 1242.

I am persuaded that Congress did not intend to create joint and coordinate jurisdiction over each dam. The statements of congressmen, Secretary of the Interior Harold Ickes, and officials of his department show that the basin's development was to be co[o]rdinated by assigning construction, operation, and control of each dam to the agency with the dominant interest in the dam: the Corps would build flood control dams and the Bureau would build those dams intended primarily for irrigation; the Bureau's interest in the irrigation aspects of a flood control dam would be accommodated by letting the Bureau control the irrigation distribution system, not the water or storage space in the reservoir.

Although many people discussed the division of control over the main stem reservoirs, nobody said that the

Bureau's level of control over certain water stored for irrigation in Corps-built dams was so complete that the Bureau could furnish that irrigation water for nonirrigation purposes—i.e., industrial or miscellaneous uses. Indeed, as I shall discuss later in more detail, Secretary Ickes expressly distinguished irrigation and industrial uses. 1944 Hearings, at 312. It also is significant that nobody said that the Bureau was to have complete control over a specific block of water which had been reserved for irrigation in a reservoir built by the Corps; the strongest support for that proposition is Rep. Whittington's statement that reclamation storage should "be under the supervision of the Interior Department." 90 Cong. Rec. 4127. In contrast, there were many statements which gave authority over flood control dams to the Corps of Engineers. The Bureau itself said that the main stem dams "should be constructed, operated and maintained by the Corps of Engineers." Letter of H. W. Bashore, H.R. Doc. No. 475, at 7. Senator Overton, the Flood Control Act's primary sponsor in the Senate, explained:

> "Someone must have control of a dam. If it is a flood-control or navigation dam, the Secretary of War has charge of it, and if it is an irrigation dam, the Secretary of Interior has charge of it."

90 Cong. Rec. 8315. See, also, 90 Cong. Rec. 8245 (statement of Sen. Overton). Senator O'Mahoney said:

> "The flood-control policy envisaged the construction of vast new works which would store great amounts of water, over which the War Department and the Army engineers would have jurisdiction. . . . [S]o far as the War Department is concerned, it should have jurisdiction over those works which are to be constructed primarily for flood control, but if they store surplus water, such waters should be made available for any purpose. . . ."

90 Cong. Rec. 8548. Neither senator qualified his statements or implied that the Interior Department had any authority over the water in reservoirs built by the Corps. Senator O'Mahoney did say that surplus water should be made available for any use, but he did not say that the Interior Department was to make it available.

The main support for the defendants comes from the statements of several congressmen that the Interior Department should prescribe regulations for irrigation storage in reservoirs operated by the Corps. See 90 Cong. Rec. 4130 (statement of Rep. Curtis); 1944 Hearings, at 527 (statement of Maj. Gen. Reybold); 90 Cong. Rec. 4127 (statement of Rep. Whittington).

Section 6 of the House version of the Flood Control Act used the same language. Section 5 of the House bill applied the same language to a parallel situation and said that the War Department was to prescribe regulations for the use of flood control storage in all federal reservoirs. See 1944 Hearings, at 2.

However, Interior Secretary Ickes requested that Congress abandon that language. He said that § 6 of the House bill contained provisions which were "not entirely apt in their relation to the various technical features of the Federal reclamation laws" and he asked Congress to adopt a new section which said that when the Secretary of War determined that a new reservoir could be used for irrigation, the Secretary of Interior was authorized to "construct, operate, and maintain under the provisions of the Federal reclamation laws . . . such additional works in connection therewith as he may deem necessary for irrigation purposes." 1944 Hearings, at 313. Congress adopted Ickes' proposal as § 8 of the final Flood Control Act.

The difference between the two sections is striking: the former allows regulations about storage; the latter permits construction and operation of irrigation works

which are added to a Corps-operated reservoir. The focus shifts from water in the reservoir to water that has been removed from the reservoir. Furthermore, § 8 concerns only dams and reservoirs "operated under the direction of" the Army, indicating that the Army retains control of the water still in the reservoir.

It is significant that § 5 of the House bill, which required the War Department to prescribe regulations for flood control storage, was adopted without change as § 7 of the Flood Control Act. The implication that the authority to operate irrigation works and the authority to prescribe regulations are different is reinforced by the fact that the Department of the Army has prescribed regulations for the use of flood control storage at Bureau-built dams, 33 C.F.R. § 208.11, while, to my knowledge, the Code of Federal Regulations does not contain any Interior Department rules for the use of irrigation storage in reservoirs built by the Corps.

The defendants argue that Secretary Ickes would not have proposed new language that would have reduced his authority. This assumes that Ickes believed he enjoyed the authority which his successors now claim, but his statements on the subject are quite inconsistent with that assumption, as I shall explain later. Moreover, the purpose of his proposal was to clarify and affirm his authority to impose the new reclamation laws' acreage restrictions and repayment requirements on California landowners who were irrigating with water from reservoirs built by the Corps. *United States v Tulare Lake Canal Co.*, 535 F.2d 1093, 1106-1107 (C.A. 9th Cir. 1976), cert. denied 429 U.S. 1121 (1977). He did not need to control the irrigation storage to accomplish this purpose. Indeed, it is not clear that such control would have been helpful. His purpose was best accomplished by his new language, which said that water from Corps reservoirs could be used for irrigation only through irrigation works and distribution systems built by the Bureau under the reclamation laws, and his plan succeeded, see, e.g., 41 Op.

Atty's Gen. 377 (1958); *Tulare Lake Canal Co.*, supra; 43 U.S.C. § 390*ll*(a)(2), although recently Congress has said that such restrictions do not apply in certain circumstances. 43 U.S.C. § 390*ll*(a).

My reading of Secretary Ickes' proposal, whereby the Secretary of War was to control the water in reservoirs built and operated by the Corps and the Secretary of the Interior was to control the additional irrigation works used to distribute the water, is consistent with a number of congressional remarks that the Interior Department was to control irrigation features or works. See, e.g., 1944 Hearings, at 457 (statement of Secretary Ickes); 90 Cong. Rec. 9282 (statement of Rep. Whittington); 90 Cong. Rec. 8245, 8625 (statements of Sen. Overton). It is also consistent with § 8's requirement that the Secretary of War must determine that the reservoir can be used for irrigation before the Secretary of Interior can build any irrigation works. If the Interior Department already controlled certain water in the reservoir because the reservoir had been built for flood control, navigation and irrigation, why should be it [sic] required to seek the War Department's approval to use that water?

My interpretation is also consistent with the control scheme proposed by the Bureau's Board of Review in the Sloan Plan. Sen. Doc. No. 191, at 11. The board said that the Corps should operate all reservoirs where flood control and navigation dominated, while the Bureau should operate all "irrigation features." *Id.* "Irrigation features" must mean the irrigation works built by the Bureau after the Corps finished the main dam; interpreting the phrase to include stored water and water storage space would conflict with the board's express statement that the Corps was to operate all reservoirs where flood control was the dominant purpose. I note that the board's suggestion that the Bureau prescribe regulations for irrigation storage was rejected when Secretary Ickes' replacement language was adopted.

In short, the congressional proceedings show that Congress intended the Corps to build, operate, and control the main stem reservoirs, while the Bureau was to build, operate, and control the irrigation works and distributions systems attached to those reservoirs.

The second major part of the defendants' argument regarding control of water stored for irrigation in reservoirs built by the Corps is based on the premise that the main stem reservoirs, including Oahe, contain water that has been stored for irrigation purposes but which will not be used for irrigation in the near future. The argument seems to be that once water storage is reserved or allocated for irrigation, the Interior Department assumes and retains control of that space and the water within it. As I recall Secretary Ickes' comment that industrial uses of water are not considered to be reclamation or irrigation uses, 1944 Hearings, at 312 I find it curious that the Interior Department is arguing, in effect, that having obtained control of certain water because of the water's intended use for irrigation, it can abandon that use (in the sense that no Oahe water has ever been used for irrigation and the Department does not expect that any will be used for irrigation for some time) and then use that water for a nonirrigation purpose.

The defendants have not pointed to any evidence which would show that specific storage space in Oahe Reservoir was assigned to irrigation. Instead, Col. Reber testified that in a multiple-purpose dam, a single block of water is allocated for navigation, power production, and irrigation together, 1944 Hearings, at 729, and statistics on storage allocation show this was done at Oahe. See "Water for Energy," supra, at 2-2, Table 2-1; 128 Cong. Rec. at S8479-8480 (daily ed. July 16, 1982) Table II. Earlier I said that joint coordination over a reservoir was possible if separate storage space was alloted for each purpose, but there is no evidence that separate al-

locations were made at Oahe. I also note that the defendants' briefs, when discussing the water which the Interior Department allegedly controls, refer to different blocks of water. See ETSI brief of February 3, 1983, at 19 (one million acre-feet of water in the main stem reservoirs allotted for industrial use by the Bureau and Corps in 1975), and at 14 (indeterminate amount of water intended but never used for irrigating the James River Basin); federal defendants' brief of March 15, 1983 (indeterminate amount of water stored in the main stem reservoirs for irrigation); ETSI brief of December 2, 1983 (indeterminate amount of water reserved in Lake Oahe for irrigation purposes). These terms do not describe the same body of water, and one wonders how the Interior Department is to control what cannot be identified.

The more important point is that while Congress undoubtedly thought that some of Oahe's water would be used for irrigation, that intent and any allocation of storage space for irrigation purposes are material only to the extent that they show that Oahe is a reclamation or power development undertaken by the Secretary of the Interior. See § 9(c), Flood Control Act. The implied argument that the Interior Department's reservation of storage space for irrigation in a reservoir built by the Corps of Engineers can constitute a reclamation development undertaken by the Secretary of the Interior does not persuade me. The Secretary of the Army undertook and developed Oahe; his department built it, always has operated it, and always has maintained it. The Secretary of the Interior, at best, merely said that some of the space in the reservoir built and operated by the Army should be available for irrigation. I say "at best," because there is scant evidence that the Secretary of the Interior ever took any action in regard to Oahe. The Pick-Sloan Plan said that his department was to determine the capacity of the reservoir for irrigation, Sen.

Doc. No. 247, at 1, but the defendants have not presented any evidence that this determination was ever made. Instead, in 1957, Congress was told that a committee comprised of representatives from seven states and seven federal agencies annually determined storage allocations for the upcoming year, and the Corps implemented those recommendations. 1957 Hearings, Part 1, at 131 (testimony of James R. Smith). Furthermore, as I earlier discussed, there is no evidence that a specific block of water was ever assigned solely for irrigation use. The only evidence that the Secretary of the Interior took any action in regard to Oahe is an unsupported assertion that he included capacity for municipal, industrial, and irrigation purposes in the main stem reservoirs. Letter of Solicitor to the Secretary of the Interior, November 27, 1974, Admin. Rec. Doc. No. 900065, at 4. I am not sure what, if anything, the Secretary of the Interior did in regard to reserving Oahe storage, but allocating space or determining reservoir capacity at a reservoir built, operated, and maintained by the Corps does not mean that the Interior Department undertook a reclamation development at Oahe.

The above discussion shows that the Corps, the Bureau, and Congress believed that § 9(c)'s reference to "reclamation and power developments undertaken by the Secretary of the Interior" meant the irrigation dams which the Bureau was to build on the Missouri River's tributaries, while § 9(b) encompassed the dams which the Army was to build, including Oahe.

C.

The text and purposes of §§ 5 through 8 of the Flood Control Act reinforce my belief that the Secretary of the Interior lacked authority to contract with ETSI.

It is clear that the Corps, the Bureau, and Congress believed that the Missouri River's water should not remain idle but should be put to the maximum possible use, including industrial uses, although the propriety of

large industrial uses was not resolved. See 90 Cong. Rec. at 8547-8548. This does not mean that the Interior Department must be able to market unused irrigation water to industrial users. Section 6 of the Flood Control Act authorizes the Secretary of the Army to make contracts for the domestic and industrial use of surplus water available at reservoirs under his control. It does not give similar authority to the Secretary of the Interior, and its legislative history shows that its grant of authority to the Army is exclusive.

Section 6 (§ 4 of the House bill) was enacted because the financial requirements of then-existing law often prevented cities and factories from obtaining water from nearby dams built by the Corps. Section 6 solved this problem by allowing the Army to furnish water for domestic or industrial uses and to set the rates for such use. 90 Cong. Rec. 4126 (statement of Rep. Whittington). Shortly after his explanation, Rep. Whittington addressed § 6 of the House bill, which said that the Interior Department was to prescribe regulations under the reclamation laws for the use of irrigation storage in Corps reservoirs. 90 Cong. Rec. 4127. This provision's reference to the reclamation laws was similar to § 9(c) of the Act as finally adopted, yet nobody suggested that the Interior Department could solve the problem by furnishing unused irrigation water. Instead, Rep. Whittington said that § 6 was needed so that "the Government" could provide water for domestic and industrial use, 90 Cong. Rec. 4197, implying that the Interior Department did not have sufficient authority. Rep. Whittington also said that § 6 would make the authority of the two departments comparable because it would give the Corps the power in reservoir districts, that the Interior Department already had in reclamation districts, 90 Cong. Rec. 4134, which are associated with dams built by the Bureau, not by the Corps. Rep. Whittington's statement does not show, as the defendants claim it does,

that the Interior Department could furnish industrial water from reservoirs controlled by the Corps.

Interior Secretary Ickes' discussion of § 6 (while it still was § 4 of the House bill) shows that he did not believe he could furnish unused irrigation water from Corps reservoirs for industrial use. He knew that the section gave that authority to the Army, but he did not ask Congress to amend the section to include the Interior Department nor did he claim that his department already had such authority; instead, he said that the section "does not involve reclamation but covers merely the sale of water for industrial purposes." 1944 Hearings, at 312. Rep. Curtis and Rep. Whittington also said that the section concerned industrial uses, while irrigation was addressed elsewhere. 90 Cong. Rec. 4133, 4197. These remarks show that industrial uses and irrigation were placed in two separate categories, and there is no indication that the categories ever could be merged. There is no reason to believe that § 6's grant of authority to the Army was not an exclusive one.

Sections 5 and 7 of the Flood Control Act also support the plaintiffs' position. Section 5 says that electricity produced at reservoirs "under the control of the War Department" shall be delivered to the Secretary of the Interior, who then shall sell it.[3] Section 7 authorizes the Secretary of War to prescribe regulations for the use of storage allocated for flood control at all federal reservoirs. These explicit grants of authority show that when Congress wanted to give an agency control over a particular function of the main stem dams, it did so expressly and

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[3] The federal defendants argue that § 5 does not apply to Oahe. The argument does not show that Congress intended to make a single implicit grant of authority to one agency, in contrast to its many explicit grants. Furthermore, the defendants' position is unreasonable. See 90 Cong. Rec. 9282-9283 (statement of Rep. Whittington); 1957 Hearings, at 323-326 (statements of Sen. Case and Sen. Anderson), 341 (testimony of Edward Weinberg), and 366-371 (memorandum of Interior Department Solicitor).

not by the implicit, indirect method upon which the defendants rely. The absence of an explicit grant of authority is even more important because Congress considered a wide range of proposals for allocating control: one rejected amendment would have given complete control to the Bureau, see 90 Cong. Rec. 8616-8618, 8626, while another would have let the Army control irrigation. *Id.*, at 8458-8550. When debate is so broad in scope and so detailed in nature, it is unlikely that matters were left for implication. I believe that Congress said what it meant and did not intend to leave anything regarding authority to implication.

D.

The defendants argue that I should defer to the Interior Secretary's decision to sign the ETSI contract because it is the decision of an administrative agency and because it is supported by the 1975 Memorandum of Understanding between his department and the Army and by a 1974 memorandum of the Interior Department's solicitor.

The 1975 memorandum does not support the Secretary's decision, but could be read to mean that the Secretary entered it because he believed that he could not act unilaterally. I do not draw that inference, because the Secretary may have entered it for other reasons. Nor shall I defer to the 1974 memorandum, in which the department's solicitor said that the Flood Control Act and the Reclamation Projects Act, when read together, allow the Interior Department to contract with ETSI. Admin. Rec. Doc. No. 900065. The memorandum is just the solicitor's interpretation of several statutes; it does not employ any special technical expertise nor rely on any policy consideration. Therefore, it is entitled to little deference. *Texas Gas Corp. v Shell Oil Co.*, 363 U.S. 263, 270 (1960); *Hi-Craft Clothing Co. v National Labor Relations Board*, 660 F.2d 910, 914 (C.A. 3rd Cir. 1981). The memorandum and the Secretary's decision also at-

tempt to expand the department's jurisdiction, and an agency may not decide the limits of its statutory power. *Social Security Board v Nierotko*, 327 U.S. 358, 369 (1946); *Office of Consumers' Counsel v Federal Energy Regulatory Commission*, 655 F.2d 1132, 1142 (C.A. D.C. Cir. 1980); *Hi-Craft Clothing Co.*, supra, at 916; *Office of Communication of the United Church of Christ v Federal Communications Commission*, 707 F.2d 1413, 1422-1423 (C.A. D.C. Cir. 1983). This is particularly true here, because the Interior Department is asserting control over reservoirs built and operated by the Army, which has disputed the Interior Department's authority to market water unilaterally. See Memorandum of Richard Kearney, Acting General Counsel of the Army, December 16, 1974, Admin. Rec. Doc. No. 900407, at 7, n. 1. When the chief attorneys for the two departments affected by a statute disagree, neither enjoys any deference.

My reluctance to defer to the Secretary of the Interior is strengthened by the fact that the department did not assert such authority while Congress was considering the Flood Control Act but waited until 1974. *Federal Trade Commission v Bunte Brothers, Inc.*, 312 U.S. 349, 351-352 (1941); *Federal Trade Commission v Miller*, 549 F.2d 452, 457 (C.A. 7th Cir. 1977). Additionally, deference is not proper when the agency's decision is neither adequately articulated nor reasonable. *Obremski v Office of Personnel Management*, 699 F.2d 1263, 1269 (C.A. D.C. Cir. 1983). The only expressed basis for the Secretary's decision was the 1974 memorandum of his solicitor, but that memorandum neither mentions the fact that § 9(c) of the Flood Control Act only applies to reclamation developments undertaken by the Interior Department nor explains why Oahe satisfies that requirement.

E.

Two other matters remain. First, the parties attached their exhibits to their briefs instead of filing them with

supporting affidavits. I have not relied on any such exhibits which were not photocopies of congressional material or documents contained in the administrative record.

Second, South Dakota, participating as amicus curiae, argues that the entire issue discussed in this memorandum is irrelevant, because the Army has delegated its authority to the Interior Department. It bases this argument on the fact that the Corps approved ETSI's request for permission to build an intake structure in Lake Oahe, which would be used to remove the water pursuant to the contract. As I understand it, the permit was granted pursuant to 33 U.S.C. § 403, whose purpose is to prevent private parties from building obstructions in navigable waters. *United States v Logan and Craig Charter Service*, 676 F.2d 1216, 1218 (C.A. 8th Cir. 1982). I do not know that the Corps could have rejected the request merely because it believed that the Interior Department could not have authorized the withdrawal of the water which will require the intake structure. Furthermore, the extensive briefs of the defendants do not raise this issue, even though several were submitted after South Dakota's briefs. Given the defendants' ample opportunity in which to present evidence or to argue on this point, I shall not delay my resolution of the pending motions.

The plaintiffs have shown that the Flood Control Act did not authorize the Secretary of the Interior to execute the ETSI contract, and I shall grant their requests for a permanent injunction barring the defendants from performing that contract.

Dated May 3, 1984.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV82-L-442

STATE OF MISSOURI, *et al.*,
Plaintiffs,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Defendants.

CV82-L-443

KANSAS CITY SOUTHERN RAILWAY CO., *et al.*,
Plaintiffs,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Defendants.

[Filed May 3, 1984]

JUDGMENT OF PERMANENT INJUNCTION

In accordance with the accompanying memorandum,

IT IS ORDERED:

1. That the motion of ETSI for summary judgment, filing 57 in CV82-L-442, is denied as to Count I of the amended complaint, filing 175;

2. That the motion of ETSI for summary judgment, filing 67 in CV82-L-443, is denied as to Count III of the second amended complaint, filing 168;

3. That the joint motions of the federal defendants and ETSI to dismiss, filings 73 and 97 in CV82-L-442, are denied as to Count I of the amended complaint, filing 175;

4. That the joint motions of the federal defendants and ETSI to dismiss, filings 70 and 104 in CV82-L-443, are denied as to Count III of the second amended complaint, filing 168;

5. That the motion of the States of Missouri, Iowa, and Nebraska for summary judgment, filing 143 in CV 82-L-442, is granted as to Count I of the amended complaint, filing 175;

6. That the motion of the Sierra Club and the Nebraska, Rocky Mountain and Iowa chapters of the Farmers Educational and Cooperative Union of American for summary judgment, filing 147 in CV82-L-443, is granted as to Count III of the second amended complaint, filing 168; and

7. That the defendants are enjoined from performing the "Industrial Water Service Contract Between the United States and ETSI Pipeline Project, a Joint Venture," dated July 6, 1982.

Dated May 3, 1984.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1674/1675/1719/1720/1721NE

THE STATE OF MISSOURI, *et al.*,
Appellees,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellants.

Appeal from the United States District Court
for the District of Nebraska

[Filed Mar. 13, 1986]

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the said District Court is affirmed in accordance with the opinion of this Court.

Costs of Appellees/Cross-appellants, States of Missouri, Iowa, and Nebraska for briefs from Appellants/Cross-appellees: $285.00

March 13, 1986

A true copy:

/ /Robert D. St. Vrain

ATTEST:

Clerk, U.S. Court of Appeals, 8th Circuit.
7/22/86

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1674-NE

THE STATE OF MISSOURI, *et al.*,
Appellees,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellants.

No. 84-1675-NE

THE STATE OF MISSOURI, *et al.*,
Appellees,

vs.

ENERGY TRANSPORTATION SYSTEMS, INC.,
Appellant.

No. 84-1719-NE

THE STATE OF NEBRASKA,
Appellant,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellees.

No. 84-1720-NE

THE STATE OF IOWA,
Appellant,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellees.

No. 84-1721-NE

THE STATE OF MISSOURI,
Appellant,

vs.

COLONEL WILLIAM R. ANDREWS, JR., *et al.*,
Appellees.

Appeals from the United States District Court
for the District of Nebraska

Appellants' petitions for rehearing en banc have been considered by the Court and are denied.

Judges Donald P. Lay, Gerald W. Heaney, Theodore McMillian, Roger L. Wollman, and Frank Magill would have granted the petitions.

Petitions for rehearing by the panel are also denied.

July 10, 1986

Order entered at the Direction of the Court:

/s/ [Illegible]

APPENDIX E

FLOOD CONTROL—CONSTRUCTION

See Congressional Comment, p. 1349

CHAPTER 665—PUBLIC LAW 534

[H. R. 4485]

An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy:

(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement

for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for con-

struction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the

event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9 (a) of the Reclamation Project Act of 1939 (53 Stat. 1187)[24] and subsection 3 (a) of the Act of August 11, 1939 (53 Stat. 1418),[25] as amended, are hereby amended accordingly.

Sec. 2. That the words "flood control" as used in section 1 of the Act of June 22, 1936,[26] shall be construed to include channel and major drainage improvements, and that hereafter Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and water-flow retardation and soil-erosion prevention on watersheds shall be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress.

Sec. 3. That section 3 of the Act approved June 22, 1936 (Public, Numbered 738, Seventy-fourth Congress),[27] as amended by section 2 of the Act approved June 28, 1938 (Public, Numbered 761, Seventy-fifth Congress),[28] shall apply to all works authorized in this Act, except that for any channel improvement or channel rectification project provisions (a), (b), and (c) of section 3 of said

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[24] 43 U.S.C.A. § 485h.

[25] 16 U.S.C.A. § 590z-1.

[26] 33 U.S.C.A. § 701a.

[27] 33 U.S.C.A. § 701c.

[28] 33 U.S.C.A. § 701c-1.

Act of June 22, 1936, shall apply thereto, and except as otherwise provided by law: *Provided*, That the authorization for any flood-control project herein adopted requiring local cooperation shall expire five years from the date on which local interests are notified in writing by the War Department of the requirements of local cooperation, unless said interests shall within said time furnish assurances satisfactory to the Secretary of War that the required cooperation will be furnished.

Sec. 4. The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: *Provided*, That preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the public interest. The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the ~~State~~ in which such area is situated. All moneys received for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

Sec. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

Sec. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be depos-

ited in the Treasury of the United States as miscellaneous receipts.

Sec. 7. Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations: *Provided*, That this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the Lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio River in accordance with such instructions as may be issued by the War Department.

Sec. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388,[29] and Acts amendatory theerof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation law and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reserviors operated under the direction of the Secretary of War may be utilized hereafter for

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[29] 43 U.S.C.A. § 372 et seq.

irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

Sec. 9. (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938,[30] as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388,[31] and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands,

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[30] 33 U.S.C.A. § 701b et seq.

[31] 43 U.S.C.A. § 372 et seq.

and repayment therefor, shall be in accordance with the laws relating to Indian lands.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior.